

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 1, 1953, to December 31, 1954

RICHARD W. ERVIN
Attorney General



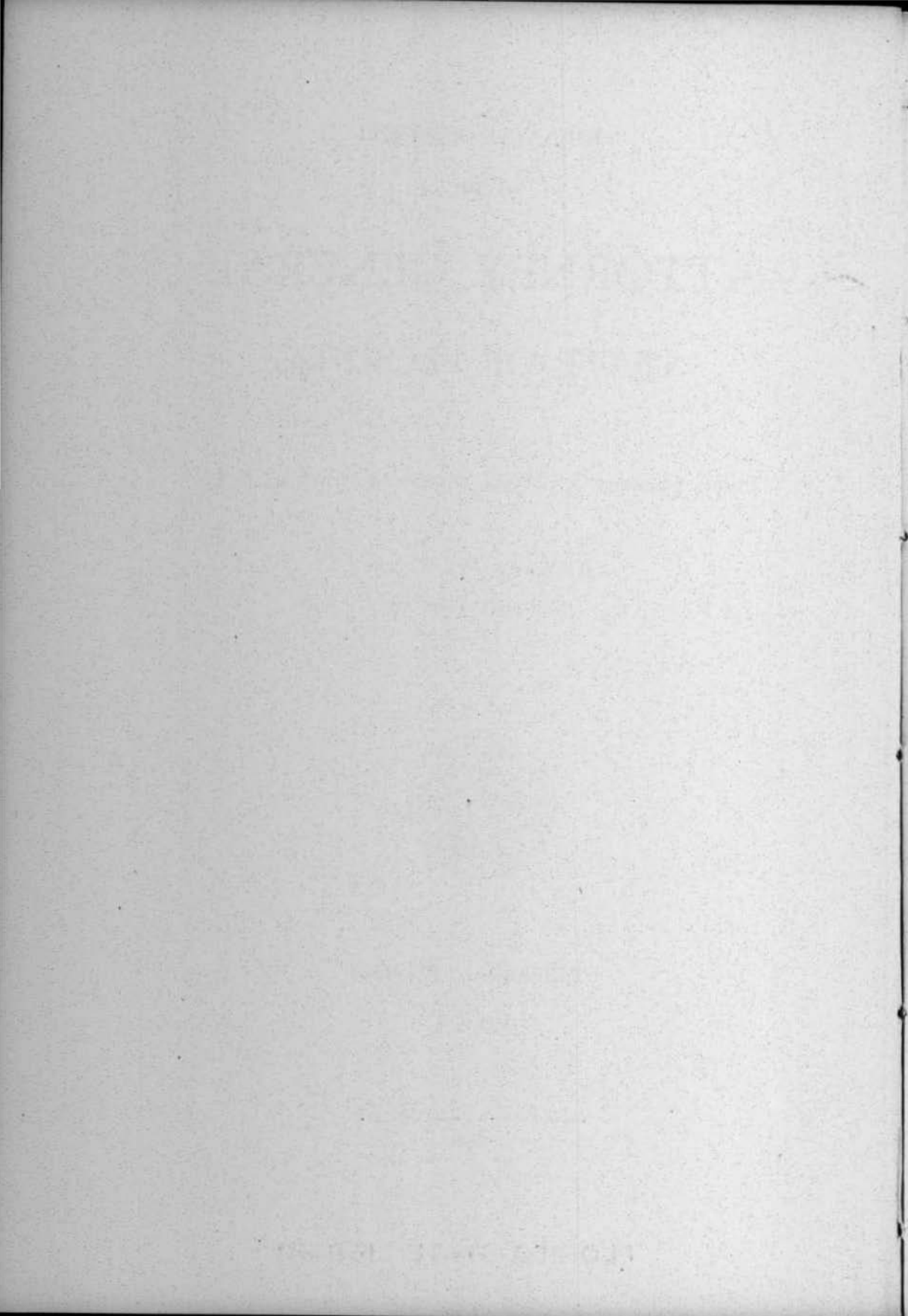
Tallahassee, Florida

1954

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STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

RICHARD W. ERVIN
ATTORNEY GENERAL

January 5, 1955

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE LEROY COLLINS
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1953 through December 31, 1954. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts, of the receipts and expenditures of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

In keeping with the long established custom, this report, with a brief of all opinions of general interest rendered during two calendar years, includes a listing of former Attorneys General, the personnel of my office during the past two years, the membership of the Florida Supreme Court, Circuit Judges, Judges of the Courts of Record, the Courts of Crime, the Criminal Courts of Record, the Civil Courts of Record, Juvenile Courts and the County Judges. Listed also are the State Attorneys, the Assistant State Attorneys and County Solicitors.

Pertinent information, reports and statistics connected with the activities of my office and opinions rendered during the last biennium as printed herein will be found listed in the Table of Contents.

Respectfully submitted,
RICHARD W. ERVIN
ATTORNEY GENERAL

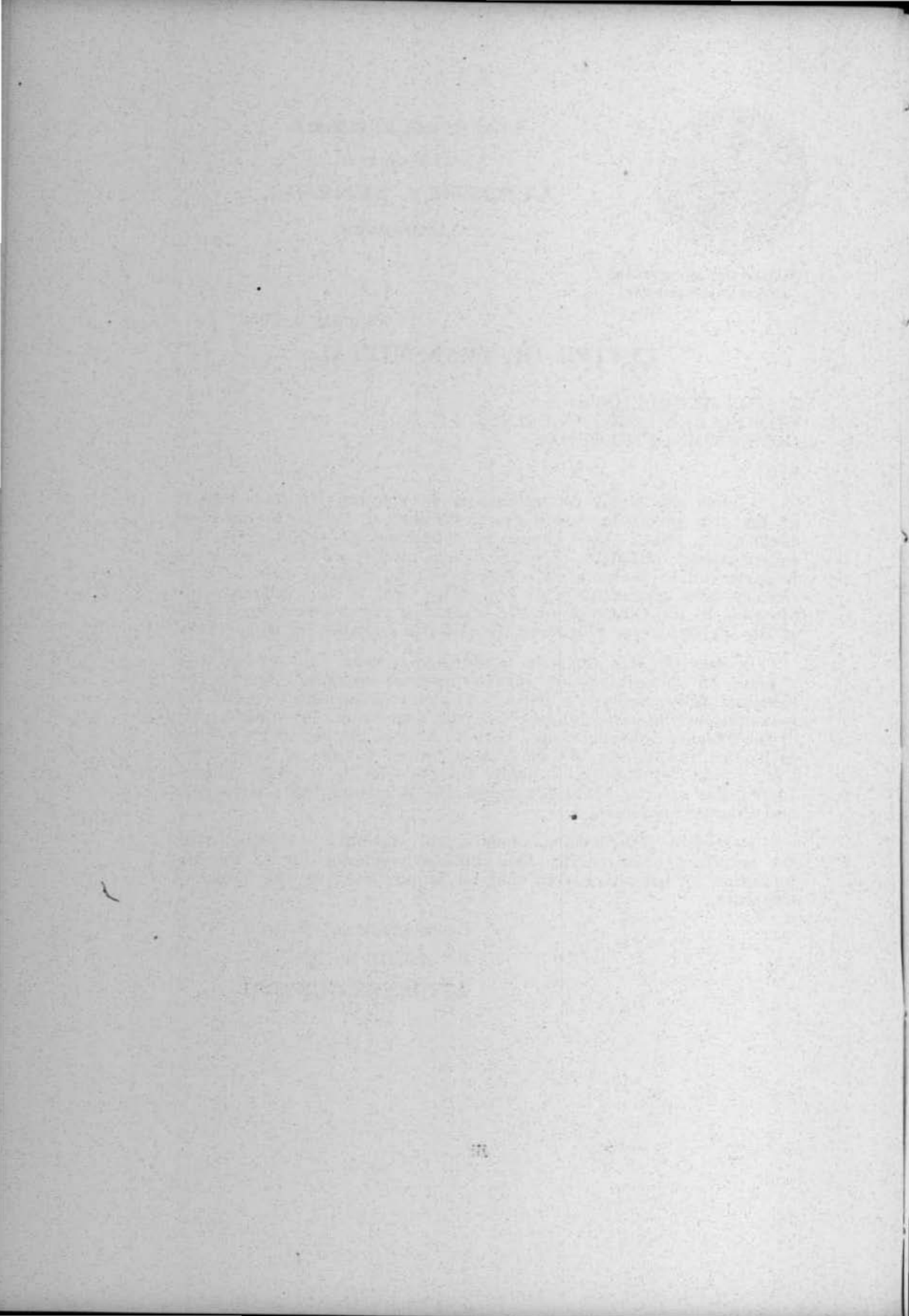


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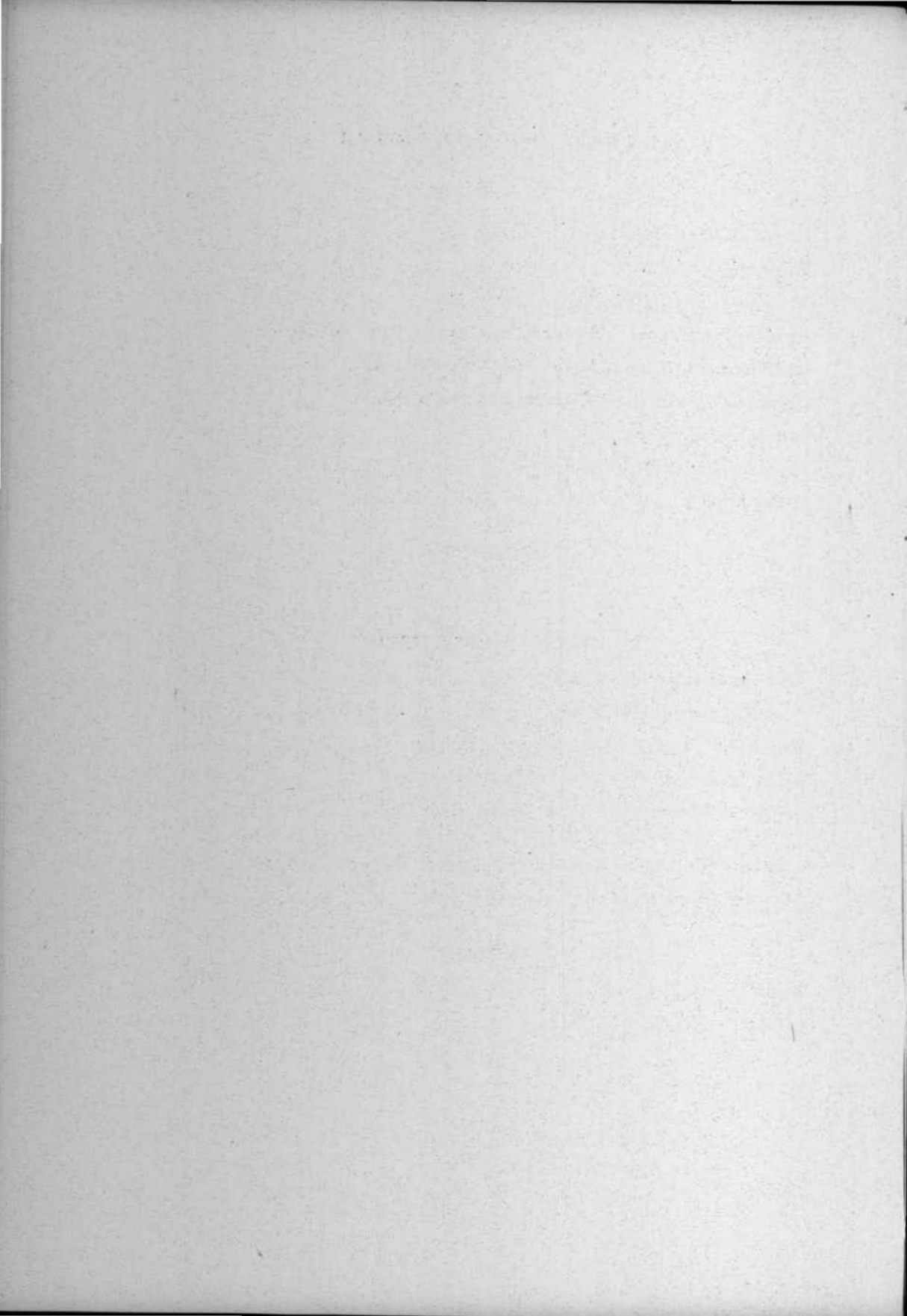
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ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

JOSEPH BRANCH.....	1845-1846
AUGUSTUS E. MAXWELL.....	1846-1848
JAMES T. ARCHER.....	1848-1848
DAVID P. HOGUE.....	1848-1853
MARIANO D. PAPY.....	1853-1860
JOHN B. GALBRAITH.....	1860-1868
JAMES D. WESCOTT, JR.....	1868-1868
A. R. MEEK.....	1868-1870
SHERMAN CONANT.....	1870-1870
J. P. C. DREW.....	1870-1872
H. BISBEE, JR.....	1872-1872
J. P. C. EMMONS.....	1872-1873
WILLIAM A. COCKE.....	1873-1877
GEORGE P. RANEY.....	1877-1885
C. M. COOPER.....	1885-1889
WILLIAM B. LAMAR.....	1889-1903
JAMES B. WHITFIELD.....	1903-1904
W. H. ELLIS.....	1904-1909
PARK TRAMMELL.....	1909-1913
THOMAS F. WEST.....	1913-1917
VAN C. SWEARINGEN.....	1917-1921
RIVERS BUFORD.....	1921-1925
J. B. JOHNSON.....	1925-1927
FRED H. DAVIS.....	1927-1931
CARY D. LANDIS.....	1931-1938
GEORGE COUPER GIBBS.....	1938-1941
J. TOM WATSON.....	1941-1949
RICHARD W. ERVIN.....	1949-



In Memoriam

JOHN THOMAS (J. TOM) WATSON

Born—Danville, Virginia, November 20, 1885.

Died—Tampa, Florida, October 24, 1954.

John Thomas (J. Tom) Watson was born in Danville, Virginia, November 20, 1885, and died suddenly at his home in Tampa, Florida, on October 24, 1954, at the age of 68. Interment was made in the family plot in Danville, Virginia. Immediate survivors are his widow, Mrs. Mary Boisseau Watson, and his sons, Lt. Colonel Pat B. Watson, Tokyo, Japan, Tom Watson, Jr., Fort Lauderdale, Florida, and Dean C. Watson, Amarillo, Texas.

J. Tom Watson, eldest son of George A. Watson and Sallie Keen Watson was born in his father's home and received his

early education from schools in Danville, including the Danville Military College. To complete his college education and to study law, he accepted employment with the American Tobacco Company, being employed in Chicago, Illinois, New Orleans, Louisiana, and Tampa, Florida.

In 1909 he enrolled in the School of Law, Washington and Lee University at Lexington, Virginia, from whence he graduated with the degree of Bachelor of Laws in 1911. He was admitted to the practice of law in Virginia in July, 1911 and in Florida, September, 1911.

Mr. Watson was municipal judge for the City of Tampa, Florida, from 1913 to 1915, and later was a member of the House of Representatives of the Florida Legislature from Hillsborough County in 1931. In 1934 he was appointed Special Assistant Attorney General, United States Department of Justice, being primarily concerned with the lands division during the land acquisition for the cross-state canal. He served in this capacity from 1935 to 1938.

In 1940, J. Tom Watson was elected the 27th Attorney General of the State of Florida, being re-elected in 1944. He did not seek re-election in 1948, but returned to Tampa and re-entered the private practice of law. Far from retiring from political life, he continued to maintain a keen interest in the happenings of his immediate area, the state and the nation. At the time of his death, he was the Republican candidate for Governor of Florida, in a vigorous attempt to revive the two-party system in the state.

His philosophy of the law was predicated upon his profound faith in The Almighty God, his understanding of the Constitution, and his trust in the continuing democratic process in the nation.

He felt that his most significant contribution to the laws of Florida was his crusade, resulting in the passage of the "Right-to-Work" Amendment, Section 12 of the Declaration of Rights of the State Constitution. This amendment guarantees laborers in Florida the right to work regardless of membership in union organizations.

J. Tom Watson was a member of the Presbyterian Church, the Masons, the Elks, the Knights of Pythias, Phi Delta Theta, Phi Delta Phi, and the Florida and Virginia Bar. In 1947 the Association of Attorneys General of the United States elected him its president, an honor of which he was justly proud, and a position in which he served well.

We shall miss him. He was for many years known as the most colorful figure in Florida politics. His honest and independent views were forcefully expressed, and he never permitted anyone or anything to alter his sincere concept of government by and for the people. His courage and integrity of spirit shall serve as guideposts for future generations.



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In Memoriam

JAMES BEARDEN TONEY

Born—Birmingham, Alabama, June 9, 1904.

Died—Tallahassee, Florida, September 27, 1954.

James Bearden Toney will be missed. Florida has lost a good friend and a devoted public servant. Born in Birmingham, Alabama, on June 9, 1904, he died following a sudden return of a serious illness in Tallahassee, Florida, at the age of fifty. His sole survivor is his widow, Mrs. Carmen Pons Toney. Graduated from Georgia Technological University with a Bachelor of Science Degree, he completed his legal education at Asheville University.

Mr. Toney was employed in construction work prior to his

appointment in Tampa as secretary of a city agency establishing memorial parks, in 1925. Thus started a life of dedicated public service. From September 1926 until 1941 he served as deputy tax collector and license supervisor for the city of Tampa.

Mr. Toney was a member of The Florida Bar and the Tallahassee Bar. He served as an Assistant Attorney General for the State from 1941 until his untimely death on September 27, 1954. For some seven years, from 1941 until 1948, he was the First Assistant Attorney General and Administrative Assistant to the Attorney General. On February 16, 1941, he married the former Carmen Pons. From 1950 until 1954, Mr. Toney served conscientiously and fearlessly as an Assistant Attorney General in the law enforcement division of the Attorney General's office; and, despite great personal risk, he constantly maintained an outstanding record for rooting out evil and corruption wherever it was found.

Mr. Toney was one of the most dedicated public servants ever to serve the state and her people. A lawyer by training, but an investigator at heart, he worked unrelentingly to destroy gambling enterprises in Florida. As a direct result of his strenuous efforts, several gambling underworld leaders were convicted and an empire of crime destroyed.

Mr. Toney was not content to sit back and wait for criminal gamblers to be brought to justice; he gave his life to rid Florida of these undesirable elements. Though not shot down by machine gun bullets or shotgun shells, as is so often the case, nevertheless these criminal elements were responsible for his death. Under terrible tension and stress, at times with certain law officers and clever legal minds against him, he worked tirelessly to unfold corrupt schemes and to bring the wrongdoers to justice. Never thinking of himself or his health, nothing could halt his determined drive to destroy these forces. His efforts were successful and shall inspire all men to rid the community of such undesirable elements. James Toney sought to make this world a little better place in which to live, and his efforts and presence shall be sorely missed.



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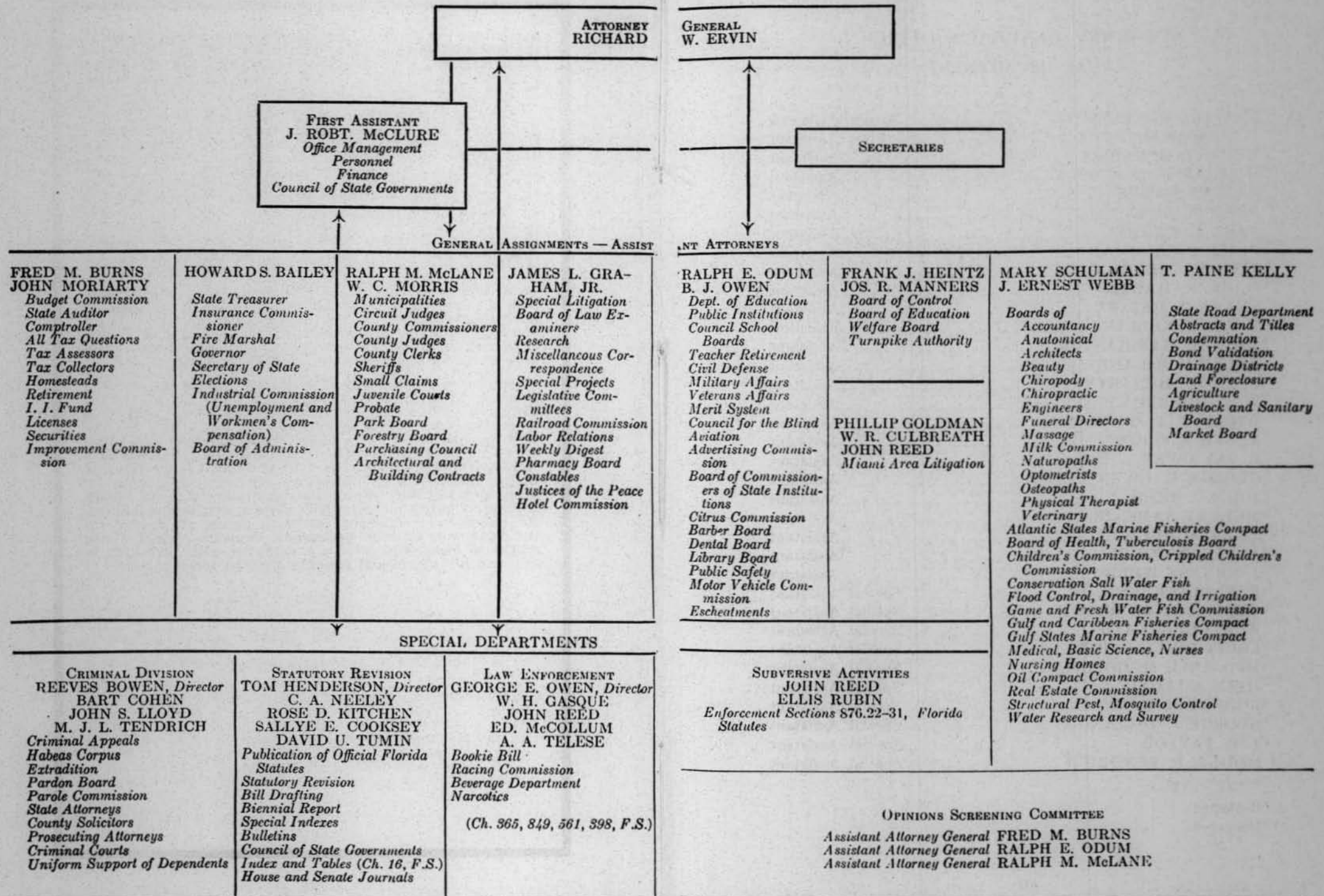
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ORGANIZATION OF ATTORNEY GENERAL'S OFFICE



ATTORNEY GENERAL'S OFFICE

LEGAL DEPARTMENT

RICHARD W. ERVIN	Attorney General
J. ROBERT McCLURE	First Assistant
HOWARD S. BAILEY	Assistant
*WILLIAM C. BOSTWICK	Assistant
REEVES BOWEN	Assistant
FRED M. BURNS	Assistant
BART L. COHEN	Assistant
PHILLIP GOLDMAN	Assistant
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*MARK R. HAWES	Assistant
FRANK J. HEINTZ	Assistant
T. PAINE KELLY	Assistant
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RALPH M. McLANE	Assistant
JOHN D. MORIARTY	Assistant
W. C. MORRIS	Assistant
*WILLIAM A. O'BRYAN	Assistant
RALPH E. ODUM	Assistant
B. JAY OWEN	Assistant
GEORGE E. OWEN	Assistant
JOHN C. REED	Assistant
*MURRAY SAMS, JR.	Assistant
MARY SCHULMAN	Assistant
**JAMES B. TONEY	Assistant
J. ERNEST WEBB	Assistant
*R. E. BLACKBURN, JR.	Special Assistant
*GEORGE EARL BROWN	Special Assistant
W. R. CULBREATH	Special Assistant
*LOUIS DE LE PARTE	Special Assistant
*MITCHELL M. GOLDMAN	Special Assistant
JOHN S. LLOYD	Special Assistant
*ROBERT E. RAY	Special Assistant
*GEORGE J. TALIANOLL	Special Assistant
*J. B. TAYLOR	Special Assistant
MOIE J. L. TENDRICH	Special Assistant

*Resigned

**Deceased

LILLIAN S. RYDER	Secretary to Attorney General
BETTY F. EPPES	Secretary to First Assistant
BESSIE MARY ALLEN	Secretary
CARRIE LOU CHAMBLESS	Secretary
LEILA K. COFIELD	Secretary
*LAVONNE CRANDALL	Secretary
*GERALDINE CROMARTIE	Secretary
CAROLINE L. DEDGE	Secretary
PAULINE H. EVANS	Secretary
BETTY HALL	Secretary
*VIRGINIA HOLLAND	Secretary
NINA LEE KINSEY	Secretary
BETTY B. KIRBY	Secretary
WINIFRED KITCHING	Secretary
*JOANNE A. LEONARD	Secretary
JUANITA S. PATTON	Secretary
ANNIE MARY PERKINS	Secretary
MINNIE D. PHILLIPS	Secretary
NELLIE JO RAULERSON	Secretary
PEGGY SUE RUSS	Secretary
SHIRLEY SWAIN	Secretary
*BETTY NELL WHITTLE	Secretary
VIRGINIA C. WILEY	Secretary
*RHONDA L. WOODBERRY	Secretary
*MARJORIE ANN CURTIS	Clerk
*MARGARET E. BLEDSOE	File Clerk
*VENEITA J. FITZGERALD	Assistant File Clerk
MARGUERITE E. KEEGAN	File Clerk
*MARJORIE L. TOUSDALE	Assistant File Clerk
GEORGIA K. BARBER	Opinion Editor
WILLIAM H. GASQUE	Investigator
ED. McCOLLUM	Investigator
A. A. TELESE	Investigator
LIDIE E. MOSS	Receptionist
HORTENSE K. WELLS	Librarian
*L. C. JENKINS	Janitor
HATTIE HOLLINGSWORTH	Maid
ROBERT LANDERS	Janitor-Machine Operator
RUTH N. LANDERS	Maid

*Resigned

ATTORNEY GENERAL'S OFFICE

STATUTORY REVISION

CHARLES TOM HENDERSON	Assistant Attorney General Director of Statutory Revision and Bill Drafting
*VIRGINIA SEARCY BARR	Special Assistant
SALLYE E. COOKSEY	Assistant
ROSE D. KITCHEN	Assistant
C. A. NEELEY	Assistant
DAVID U. TUMIN	Special Assistant
<hr/>	
JEWELL R. ROEMER	Secretary to Director
HILDA F. LIPSEY	Secretary
MARY O'Q. POMEROY	Secretary
HILDRED Y. CASEY	Part-time Typist
*MARTHA S. PATTERSON	Typist
*STELLA GLOVER POTT	Typist
EDITH GRADY COOMBS	Proofreader Clerk
CARRIE M. ERVIN	Proofreader Clerk
**MARGARET F. SAMPEY	Proofreader Clerk
DORA BELLE BROOKS	Clerk
CATHERINE COMISKEY	Clerk
*JANE WILLIAMS	Clerk
***DONALD HARTSFIELD	Machine Operator Clerk
HAROLD STEWART	Machine Operator Clerk

*Resigned
 **Deceased
 ***Military Service

JUDICIAL DEPARTMENT OF FLORIDA

SUPREME COURT JUSTICES

TALLAHASSEE, FLORIDA

<i>Chief Justice</i>		<i>Term Expires</i>
JOHN E. MATHEWS	Tallahassee	January, 1961
<i>Justices</i>		
ELWYN THOMAS	Tallahassee	January, 1957
B. K. ROBERTS	Tallahassee	January, 1959
T. FRANK HOBSON	Tallahassee	January, 1957
H. L. SEBRING	Tallahassee	January, 1961
GLENN TERRELL	Tallahassee	January, 1961
E. HARRIS DREW	Tallahassee	January, 1959
GUYTE P. McCORD	Clerk Supreme Court.	
RICHARD W. ERVIN	Attorney General, Reporter to Supreme Court.	
DEMPSEY B. MAYO	Marshal.	
CARSON F. SINCLAIR	Librarian.	

CIRCUIT JUDGES

FIRST Judicial Circuit—Escambia, Okaloosa, Santa Rosa and Walton Counties.

L. L. Fabisinski	Pensacola, Florida
D. Stuart Gillis	DeFuniak Springs, Florida

SECOND Judicial Circuit—Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla Counties.

W. May Walker	Tallahassee, Florida
Hugh M. Taylor	Quincy, Florida

THIRD Judicial Circuit—Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor Counties.

Hal W. Adams	Mayo, Florida
R. H. Rowe	Madison, Florida

FOURTH Judicial Circuit—Duval, Clay and Nassau Counties.

Charles A. Luckie	Jacksonville, Florida
Bayard B. Shields	Jacksonville, Florida
A. D. McNeill	Jacksonville, Florida
Claude Ogilvie	Jacksonville, Florida
W. A. Stanly	Jacksonville, Florida

DUVAL COUNTY CIRCUIT—Duval County.

Edwin L. Jones	Jacksonville, Florida
----------------	-----------------------

FIFTH Judicial Circuit—Citrus, Hernando, Lake, Marion and Sumter Counties.

F. R. Hocker	Ocala, Florida
T. G. Futch	Leesburg, Florida

SIXTH Judicial Circuit—Pasco and Pinellas Counties.

John U. Bird	Clearwater, Florida
John Dickinson	St. Petersburg, Florida
C. Richard Leavengood	St. Petersburg, Florida
Orvil L. Dayton, Jr.	Dade City, Florida

SEVENTH Judicial Circuit—Flagler, Putnam, St. Johns and Volusia Counties.

Geo. Wm. Jackson	St. Augustine, Florida
Robt. H. Wingfield	DeLand, Florida
P. B. Revels	Palatka, Florida

EIGHTH Judicial Circuit—Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.

Geo. L. Patten	Starke, Florida
John A. H. Murphree	Gainesville, Florida

NINTH Judicial Circuit—Brevard, Indian River, Martin, Okeechobee, Orange, Osceola, St. Lucie and Seminole Counties.

Frank A. Smith	Orlando, Florida
Vassar B. Carlton	Titusville, Florida
A. O. Kanner	Stuart, Florida
Terry B. Patterson	Winter Park, Florida

TENTH Judicial Circuit—Hardee, Highlands and Polk Counties.

D. O. Rogers	Bartow, Florida
Don Register	Winter Haven, Florida
William P. Allen	Sebring, Florida

ELEVENTH Judicial Circuit—Dade County.

George E. Holt	Miami, Florida
Marshall C. Wiseheart	Miami, Florida
Stanley Milledge	Miami, Florida
Charles A. Carroll	Miami, Florida
J. Fritz Gordon	Miami, Florida
William A. Herin	Miami, Florida
Grady L. Crawford	Miami, Florida
Vincent C. Giblin	Miami, Florida
Pat Cannon	Miami, Florida
Robert L. Floyd	Miami, Florida

TWELFTH Judicial Circuit—DeSoto, Charlotte, Collier, Glades, Hendry, Lee, Manatee and Sarasota Counties.

Lynn Gerald	Fort Myers, Florida
W. T. Harrison	Palmetto, Florida

THIRTEENTH Judicial Circuit—Hillsborough County.

L. L. Parks	Tampa, Florida
Harry N. Sandler	Tampa, Florida
Henry C. Tillman	Tampa, Florida
I. C. Spoto	Tampa, Florida

FOURTEENTH Judicial Circuit—Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties.

E. C. Welch	Marianna, Florida
E. Clay Lewis, Jr.	Panama City, Florida

FIFTEENTH Judicial Circuit—Broward and Palm Beach Counties.

C. E. Chillingworth	West Palm Beach, Florida
Lamar G. Warren	Ft. Lauderdale, Florida
Jos. S. White	West Palm Beach, Florida
Otis L. Farrington	Ft. Lauderdale, Florida

SIXTEENTH Judicial Circuit—Monroe County.

Aquilino Lopez, Jr.	Key West, Florida
---------------------	-------------------

JUDGES AND SOLICITORS

BROWARD COUNTY CRIMINAL COURT OF RECORD

W. T. Kennedy _____ Judge
Otis Farrington _____ Solicitor

DADE COUNTY CRIMINAL COURT OF RECORD

Ben C. Willard..... Judge
John D. Marsh..... Solicitor

DUVAL COUNTY CRIMINAL COURT OF RECORD

William T. Harvey..... Judge
Harry H. Martin..... Solicitor

HILLSBOROUGH COUNTY CRIMINAL COURT OF RECORD

L. A. Grayson..... Judge
Paul B. Johnson..... Solicitor

MONROE COUNTY CRIMINAL COURT OF RECORD

Thos. S. Caro..... Judge
Allan B. Cleare, Jr..... Solicitor

PALM BEACH COUNTY CRIMINAL COURT OF RECORD

Edward G. Newell..... Judge
T. Harold Williams..... Solicitor

POLK COUNTY CRIMINAL COURT OF RECORD

Roy H. Amidon..... Judge
Clifton M. Kelly..... Solicitor

ORANGE COUNTY CRIMINAL COURT OF RECORD

W. M. Murphy..... Judge
Richard Cooper..... Solicitor

ESCAMBIA COUNTY COURT OF RECORD

Ernest E. Mason.....Judge
John L. Reese.....Solicitor

PINELLAS COUNTY CIVIL AND CRIMINAL COURT
OF RECORD

C. Richard Leavengood, St. Petersburg, Fla. Judge

JUDGE OF COURT OF CRIMES

Dade County.....Hon. Ray H. Pearson, Miami

JUDGES OF CIVIL COURT OF RECORD

Dade County	Hon. D. J. Heffernan, Miami
	Hon. Norman Hendry, Miami
	Hon. John C. Wynn, Miami
Duval County	Hon. Burton Barrs, Jacksonville

JUDGES OF JUVENILE COURT

<i>County</i>	<i>Name—Date Term Expires</i>
Broward	Dorr S. Davis, Ft. Lauderdale (e) January, 1957
Dade	Walter H. Beckham, Miami (a) July 2, 1953
Duval	W. S. Criswell, Jacksonville (a) Aug. 18, 1955
Hillsborough	O. D. Howell, Jr., Tampa (a) July 31, 1955
Monroe	Mrs. Eva Warner Gibson, Key West (e) January, 1957
Orange	Mrs. Mattie H. Farmer, Orlando (e) January, 1957
Pinellas	William G. Gardiner, St. Petersburg (a) June 12, 1955
Polk	G. Bowdon Hunt, Bartow (a) Oct. 1, 1958

STATE ATTORNEYS

FIRST Judicial Circuit	Ed. Wicke, Pensacola Escambia, Okaloosa, Santa Rosa and Walton Counties.
SECOND Judicial Circuit	William D. Hopkins, Tallahassee Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla Counties.
THIRD Judicial Circuit	Wm. Randall Slaughter, Live Oak Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor Counties.
FOURTH Judicial Circuit	William A. Hallowes, III, Jacksonville Clay, Duval and Nassau Counties.
FIFTH Judicial Circuit	A. P. Buie, Ocala Citrus, Hernando, Lake, Marion and Sumter Counties.
SIXTH Judicial Circuit	Clair A. Davis, St. Petersburg Pasco and Pinellas Counties.
SEVENTH Judicial Circuit	Murray Sams, DeLand Flagler, Putnam, St. Johns and Volusia Counties.
EIGHTH Judicial Circuit	T. E. Duncan, Gainesville Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.
NINTH Judicial Circuit	Murray W. Overstreet, Kissimmee Brevard, Indian River, Martin, Okeechobee, Orange, Osceola, St. Lucie and Seminole Counties.
TENTH Judicial Circuit	Gunter Stephenson, Winter Haven Hardee, Highlands and Polk Counties.
ELEVENTH Judicial Circuit	George A. Brautigam, Miami Dade County.
TWELFTH Judicial Circuit	Wm. M. (Mack) Smiley, Bradenton Charlotte, Collier, DeSoto, Glades, Hendry, Lee, Manatee and Sarasota Counties.
THIRTEENTH Judicial Circuit	James M. McEwen, Tampa Hillsborough County.
FOURTEENTH Judicial Circuit	J. Frank Adams, Blountstown Bay, Calhoun, Gulf, Holmes, Jackson, Washington Counties.
FIFTEENTH Judicial Circuit	Phil O'Connell, West Palm Beach Broward and Palm Beach Counties.
SIXTEENTH Judicial Circuit	J. Lancelot Lester, Key West Monroe County.

ASSISTANT STATE ATTORNEYS

- FIRST Judicial Circuit..... Charles A. Wade, Crestview
Escambia, Okaloosa, Santa Rosa and Walton Counties.
- SECOND Judicial Circuit..... Harry Morrison, Wakulla
Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla
Counties.
- THIRD Judicial Circuit..... O. O. Edwards, Cross City
Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and
Taylor Counties.
- FOURTH Judicial Circuit..... Nathan Schevitz, Jacksonville
Richard C. Gordie, Green Cove Springs
Thomas J. Shave, Jr., Fernandina
Clay, Duval and Nassau Counties.
- FIFTH Judicial Circuit..... Z. D. Giles, Leesburg
Citrus, Hernando, Lake, Marion and Sumter Counties.
- SIXTH Judicial Circuit..... Sam Y. Allgood, Jr., New Port Richey
A. T. Cooper, Jr., Clearwater
Pasco and Pinellas Counties.
- SEVENTH Judicial Circuit..... Julian C. Calhoun, Palatka
Flagler, Putnam, St. Johns and Volusia Counties.
- EIGHTH Judicial Circuit..... Joe Hill Williams, Starke
Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.
- NINTH Judicial Circuit..... Thad H. Carlton, Ft. Pierce
Hubert E. Griggs, Cocoa
Brevard, Indian River, Martin, Okeechobee, Orange, Osceola,
St. Lucie and Seminole Counties.
- TENTH Judicial Circuit..... L. Grady Burton, Wauchula
Hardee, Highlands and Polk Counties.
- ELEVENTH Judicial Circuit..... Harry L. Durant, Miami
Eugene A. Williams, Miami
Hughlan Long, Miami
Adele Segall Fiske, Miami
Joseph E. Price, Miami
Dade County.
- TWELFTH Judicial Circuit..... E. M. Magaha, Fort Myers
Lynn N. Silvertooth, Sarasota
Charlotte, Collier, DeSoto, Glades, Hendry, Lee, Manatee and
Sarasota Counties.
- THIRTEENTH Judicial Circuit..... J. Frank Umstot, Tampa
Hillsborough County.
- FOURTEENTH Judicial Circuit..... Larry G. Smith, Panama City
Bay, Calhoun, Gulf, Holmes, Jackson, and Washington Counties.
- FIFTEENTH Judicial Circuit..... Frank S. Cannova, Hollywood
Broward and Palm Beach Counties.
- SIXTEENTH Judicial Circuit..... None
Monroe County.

COUNTY JUDGES, 1953-1957

<i>County</i>	<i>Name</i>	<i>County Seat</i>
Alachua	H. H. McDonald	Gainesville
Baker	J. C. Lyons	Macclenny
Bay	Joseph W. Bailey	Panama City
Bradford	Theron A. Yawn	Starke
Brevard	Virgil B. Conkling	Titusville
Broward	Boyd H. Anderson	Ft. Lauderdale
Calhoun	Hannah B. Gaskin	Blountstown
Charlotte	John T. Rose, Jr.	Punta Gorda
Citrus	O. Frank Scofield	Inverness
Clay	Thomas J. Rivers	Green Cove Springs
Collier	S. S. Jolley	Everglades
Columbia	G. A. Buie, Jr.	Lake City
Dade	W. F. Blanton	Miami
(Additional)	Frank B. Dowling	Miami
DeSoto	Gordon Hays	Arcadia
Dixie	Ike C. Harmon	Cross City
Duval	McKinney J. Davis	Jacksonville
Escambia	Harvey E. Page	Pensacola
Flagler	E. W. Johnston, Sr.	Bunnell
Franklin	Raymond M. Witherspoon	Apalachicola
Gadsden	H. Y. Reynolds	Quincy
Gilchrist	Elwyn M. Akins	Trenton
Glades	J. M. Couse	Moore Haven
Gulf	J. E. Pridgeon	Wewahitchka
Hamilton	Ernest Rutledge	Jasper
Hardee	Lefferts L. Mabie, Jr.	Wauchula
Hendry	R. M. Harris	LaBelle
Hernando	Monroe W. Treiman	Brooksville
Highlands	Harry Lee	Sebring
Hillsborough	William C. Brooker	Tampa
Holmes	Klein McDonald	Bonifay
Indian River	Otis M. Cobb	Vero Beach
Jackson	Robert L. McCrary, Jr.	Marianna
Jefferson	Kenneth E. Cooksey	Monticello
Lafayette	Guy M. McClain	Mayo
Lake	W. Troy Hall, Jr.	Tavares
Lee	Archie M. Odom	Fort Myers
Leon	Lawrence Renfroe	Tallahassee
Levy	Wilbur F. Anderson	Bronson
Liberty	R. H. Deason	Bristol
Madison	Curtis D. Earp	Madison
Manatee	Geo. R. Hitchcock	Bradenton

Marion	D. R. Smith	Ocala
Martin	Arthur R. Clonts	Stuart
Monroe	Raymond R. Lord	Key West
Nassau	H. V. Burgess	Fernandina
Okaloosa	Wilbur F. Osborn	Crestview
Okeechobee	T. W. Conely, Jr.	Okeechobee
Orange	Victor Hutchins	Orlando
Osceola	O. P. Johnson	Kissimmee
Palm Beach	Richard P. Robbins	West Palm Beach
Pasco	A. J. Hayward, Jr.	Dade City
Pinellas	Jack F. White	Clearwater
Polk	Chester M. Wiggins	Bartow
Putnam	Causey S. Green	Palatka
St. Johns	Chas. C. Mathis, Jr.	St. Augustine
St. Lucie	Flem C. Dame	Ft. Pierce
Santa Rosa	Wm. A. Bonifay	Milton
Sarasota	John D. Justice	Sarasota
Seminole	Ernest Housholder	Sanford
Sumter	P. B. Howell	Bushnell
Suwannee	J. M. Hearn	Live Oak
Taylor	Byron Butler	Perry
Union	S. B. Brooks	Lake Butler
Volusia	Robert H. Wingfield	DeLand
Wakulla	A. L. Porter	Crawfordville
Walton	Joe Dan Trotman	DeFuniak Springs
Washington	Willis Carl Trawick	Chipley

EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of Omitted Opinions listed immediately preceding the Alphabetical Index.

CHAPTER II

STATE ORGANIZATION

COUNTY BOUNDARIES

July 12, 1954.—054-163.

TAXATION—ASSESSMENT—SECTIONS 19 & 30, TOWNSHIP 4 SOUTH—RANGE 22 EAST—BRADFORD AND UNION COUNTIES

QUESTION: What portions of Sections 19 and 30, Township 4 South, Range 22 East, are subject to taxation in Bradford County and what portions in Union County, Florida?

To: *Honorable C. M. Gay, State Comptroller:*

The boundaries of this township were surveyed in 1841 and the sections and subdivisions thereof in 1845 and in said surveys there was no meandering of waters in said sections. In fixing the areas in said sections and the subdivisions thereof no allowance was made for navigable waters or unsurveyed lands. The government township plats indicate section acreages of 643.30 for Section 19 and 642.44 for Section 30. The said township plats indicate the course of the stream (New River) as of the date of the said surveys. The said government township plat, a topographical map made by the Army about 1918, and other plats and maps available to us indicate that the area is low and swampy and such that water courses may have changed from time to time and that the river could and may have found new or additional channels from time to time.

The west boundary of Bradford County is described as "beginning at a point where the thread of New River intersects the thread of the Santa Fe River; thence northeasterly concurrent with the east boundary of Union County following the meanderings of said New River to where the same intersects the middle township line of Township four south, Range twenty-two east;..." (§7.04, F.S.). The east boundary of Union County is described as beginning at a point on the south boundary of Baker County where the bed of "New River intersects said line; thence following the meanderings of the thread of said New River in a southwesterly direction to the thread of the Santa Fe River;..." (§7.63, F. S.). This description is substantially identical with that in Ch. 8516, Laws of Florida, Acts of 1921, by which Union County was established. We have no evidence that the Legislature had before it anything other than the government township plat and the surveyor's field notes when it enacted the said 1921 Act creating Union County. Where a stream forms the boundary between two counties the line is the thread or middle of the *main* stream or channel (20 C. J. S. 765 §15). The legislative Act doubtless refers to the stream as it existed when such Act was passed, and artificial or sudden changes in the course of the stream do not

operate to change the county boundary. The boundary will change where the change in the course of the stream is gradual and imperceptible. The closing of a main branch or channel of a stream and the establishment of another branch or channel does not usually result in a shifting of the boundary. (20 C. J. S. 766, §15.) In this connection see also *Clemons v. Chase*, 120 Fla. 429, 162 So. 917.

We gather from the sketch of said Sections 19 and 30 handed us with the request for opinion that New River has cut a new channel within said sections although there is no evidence that the new channel was the result of a gradual and imperceptible shifting of the old or former channel. We judge from the said sketch that the old channel may still be in existence although it may be that the major flow of the river runs through the new or additional channel at this point.

We, therefore, hold that the thread of the river, as the same existed in 1921, is controlling and in the absence of any evidence as to the actual course of the stream in 1921 we are forced to presume that the course reflected by the government township plat continued until said 1921. We further feel that the old and not the new channel, as indicated on the above mentioned sketch handed us with the request for opinion, controls. The lands west of the old channel are in Union County and the lands east thereof are in Bradford County.

CHAPTER III

LEGISLATIVE DEPARTMENT

SENATE AND HOUSE OF REPRESENTATIVES

April 30, 1953.—053-87.

LEGISLATIVE COUNCIL—MEMBERS—PRESIDENT OF SENATE AS CHAIRMAN—TERMINATION OF OFFICE

QUESTIONS: 1. Where the chairmanship of the Legislative Council of this State is held by the outgoing president of the State Senate, as an ex officio member, does he cease to be the presiding officer of the said Council upon the selection and qualification of the new president of the Senate?

2. If the above question is answered in the affirmative, would the effect be the same if the outgoing president is appointed as a regular member of the Council, by the incoming president of the Senate, before the selection of a new chairman?

To: Legislative Council, CAPITOL BUILDING:

The Legislative Council is the governing board of the Legislative Reference Bureau which was created by the Legislature of 1949 and now appears as §§ 11.19-11.27, F. S. The said Council is composed of the Speaker of the House of Representatives and the President of the Senate, as ex officio members, and one member from each congressional district of the State, selected by the Speaker of the House, and the same number of members selected by the President of the Senate, such members to serve at the pleasure of their respective branches of the Legislature. Where a vacancy occurs in the regular membership of the Council, it will be filled in the same manner as original appointments, if it occurs during a session of the Legislature. At all times the President of the Senate and the Speaker of the House are ex officio members. The President of the Senate is a member of the Legislative Council by virtue of his office, and when he ceases to be the President of the Senate he likewise ceases to be a member of the Legislative Council by operation of law. The outgoing President of the Senate ceases to be a member of the Legislative Council upon the selection and qualification of his successor in office, and the incoming President of the Senate succeeds him as a member of the Council.

It is usual practice for parliamentary bodies to select their own presiding officer, unless the statutes or instrument by which established provides otherwise. We find nothing in the statutes of this State expressly providing for the selection of the presiding officer of the Legislative Council. It is likewise the general rule, in the absence of express provision in the statutes or instrument creating a parliamentary body, for the body to select one of its members as presiding officer. We find nothing in the statutes,

nor are we advised of any rule or regulation of the body itself, providing for the selection of a nonmember as presiding officer. This being true we are of the opinion that the chairman of the Legislative Council will cease to be its presiding officer in case his term as a member of the Council expired while he is its presiding officer. We, therefore, answer the first question in the affirmative.

Having answered the first question in the affirmative, it becomes necessary that we answer the second question. When the term of a person as presiding officer of the State Senate terminates by reason of the selection and qualification of a successor president he ceases to be a member of the Legislative Council. As we have hereinabove presumed that chairmanship of the body is dependent upon membership in the body, we feel that when the outgoing President of the Senate ceased to be an ex officio member of the body he likewise ceased to be chairman, which he was holding by virtue of not only his selection as chairman but also his membership in the body and which membership was necessary to selection as chairman. There was no connection between the two memberships in the body sufficient to enable him to continue to hold office as chairman. The second question is likewise answered in the affirmative; however, there would seem to be no legal reason why the body itself might not select the same person, although serving in another capacity as a member of the body, as presiding officer to fill the unexpired term of chairman.

November 16, 1954.—054-248.

AMENDMENT—SECTION 4, ARTICLE III, STATE
CONSTITUTION—EFFECT OF

QUESTIONS: 1. In the light of the constitutional provision contained in Art IX, §4, which provides: "No money shall be drawn from the Treasury except in pursuance of appropriations made by Law", is the amendment an appropriation within itself for additional funds to cover the legislative payroll?

2. If the amendment does not constitute an appropriation, please examine §11.12, F.S., and the General Appropriations Act of 1953, and advise if either of these constitutes an appropriation of funds which may be used to cover the provision of the amendment?

3. If there is an appropriation, in the light of Art. III, §6, and Art. VII, §2, of the Florida Const., upon what date should monthly payments to legislators start?

4. Are the members of the Legislature full time employees under the State Officers and Employees Retirement Act, and does the deduction from salary required by said act apply?

5. Should the Acting Governor be paid as a State Senator in addition to his salary as Acting Governor? If so, is it required

under the law that the Budget Commission approve payment from two funds?

6. May members of the Legislature be employed in other state positions? If so, will it be necessary to have approval of the Budget Commission for the payment of additional salaries as such employees from other funds?

To: Honorable C. M. Gay, State Comptroller:

Said §4, Art. III, of the State Const., in so far as here material, provides that "the compensation of legislators shall be twelve hundred (\$1,200.00) dollars each year, and shall be paid in monthly installments of one hundred (\$100.00) dollars each..." Prior to the said amendment said section provided that "the pay of members of the Senate and House of Representatives shall be ten dollars a day for each day of the session..."

Our Supreme Court, by an Advisory Opinion, 76 Fla. 418, 79 So. 874, text 875, dated November 8, 1918, advised the Governor that where an extraordinary session of the State legislature, for any date between the general election in any year and the general election two years later, is called that it will be composed of the newly elected members of the senate and house together with holdover members of the senate. In other words "the terms of office of members of the legislature begin upon their election under the Constitution." (see second headnote). To the same effect see also §3, Art. III, and §2, Art. VII, of the State Const. It, therefore, seems clear that the terms of office of members of the house and senate elected at the general election held on the first Tuesday after the first Monday in November, 1954, commenced on the following day.

Where a proposed amendment to the State Const. is submitted by the Legislature "if a majority of the electors voting upon the amendment adopt such amendment the same shall become a part of this Constitution. (§1, Art. XVII, State Const.) Under this constitutional provision the amendment in question became operative immediately upon its adoption at the general election at which submitted, no other date having been fixed by the said amendment itself or by the resolution submitting it. (Advisory Opinions to Governor in 34 Fla. 500, 16 So. 410 and in 152 Fla. 674, 12 So. 2d 876; *Perry v. Consolidated Special School District*, 89 Fla. 271, 103 So. 639; *Porter v. First National Bank*, 96 Fla. 740, 119 So. 130 and 519).

The constitutional amendment provides that "the compensation of legislators shall be twelve hundred dollars each year, and shall be paid in monthly installments of one hundred dollars each," which provision is complete within itself, in so far as amount and manner of payment is concerned, and no legislation appears to be necessary as to compensation and time of its payment; this being true the provision is self-executing as to annual compensation and the manner of its payment. (16 C.J.S. 111, §54). "Appropriations may be made by the Const., but constitutional provisions are not to be construed as themselves making appropriations unless they are clearly so intended" (81 C.J.S. 1202, §160). "Where there is

a general law fixing the amount of an official salary and prescribing payment thereof, it is generally held that the statute of itself operates as an appropriation . . ." (81 C.J.S. 1221, §164). In *Windes v. Frohmler*, 38 Ariz. 557, 3 P. 2d 275, text 276, the court had before it a constitutional provision fixing the salaries of the judges of certain state courts, expressly providing that some were to be paid by the state and others by the state and county; it was held that this constitutional provision was self-executing and constituted a constitutional appropriation. The "language in itself constituted an appropriation by the people; it being the law that no specific language is necessary to make an appropriation for the test is as to whether or not the people have expressed an intention that the money in question be paid." The constitutional amendment is clearly an expression on the part of the people of Florida that the annual salary therein mentioned be paid to the members of the legislature, and seems to satisfy the requirements of §4, Art. IX, of the State Constitution.

"Each and every officer of the state, *including members of the legislature*," are required to take the oath prescribed by §2, Art. XVI, of the State Const., *before entering upon their official duties*. Each house of the state legislature is the judge of "the qualifications, elections and returns of its members" (§6, Art. III, State Const.) and may "punish its own members for disorderly conduct" or expel a member (§9, Art. III, State Const.). "In order to qualify as an incumbent of office, the oath prescribed by the Constitution must be duly taken" (Advisory Opinion, 65 Fla. 434, 62 So. 363, text 365), which seems to be in line with the general rule, as "one of the usual necessary formalities for qualification of an officer is the taking of the official oath; and, where an oath is required, it is a prerequisite to full investiture of office" (67 C.J.S. 191, §38; see also 43 Am. Jur. 971, §125). Where members of the Legislature are required to take an oath of office, they may not enter upon the duties of their office until the required oath is taken (81 C.J.S. 941, Section 32). In order to qualify as a member of the state legislature one must take the oath prescribed by §2, Art. XVII, of the State Constitution.

Members of the legislature being state officers seem to be within the purview of §3, Art. XVI, of the State Const., and should make requisition for the salary allowed them under the amended section of the State Constitution. "The right of a legislator to salary is not based alone on service but arises as an incident to the office" (81 C.J.S. 947, §36). "Where provision is made for compensation for a public office, the right to the compensation is an incident to the office or to the right or title thereto" (67 C.J.S. 320, §83), and belongs to the officer so long as he holds the office (43 Am. Jur. 136, §342). Although the salary of the officer may commence at the beginning of the term of office, his right to the same may not arise until the taking of the official oath, although upon the taking of the oath he is entitled to the salary from the beginning of the term (43 Am. Jur. 169, Section 388).

Although members of the legislature have not heretofore taken the oath of office until the first meeting of the legislature follow-

ing their election, we find no constitutional provision fixing the time for the taking of their oath of office by members of the legislature. Section 4, Art. III, of the State Const., as amended, clearly shows an intention on the part of the people of the State of Florida to pay their legislators from the date of their election. In the light of said §4, Art. III, when read in conjunction with all other constitutional provisions bearing upon the question, we feel that members of the legislature in this state may take the constitutional oath of office immediately upon their election to office. As a certificate of election or commission of appointment constitutes prima facie title to office (67 C.J.S. 309, §75), we feel that any judicial officer of the State of Florida duly qualified to take oaths of office, upon the presentation to him of a certificate of election, or a duly certified copy thereof, of a member of the legislature, may administer the constitutional oath of office to a person elected to the legislature prior to the time of the convening of the legislature. Upon the taking of the said oath of office the same should be transmitted to the Secretary of State to be preserved by him and transmitted to the legislature when it meets.

Upon the filing of the oath of office as aforesaid the newly elected member of the legislature is qualified to receive compensation under said §4, Art. III, of the State Const. as amended. The State Comptroller is authorized to draw salary warrants to newly elected members of the State legislature whenever he files or causes to be filed in the office of the said State Comptroller certified copies of his certificate of election and oath of office and upon proper requisition. The State Comptroller may take judicial notice of who are holdover senators and issue warrants to such holdover senators upon their proper requisition.

State officers and employees, within the purview of Ch. 121, F.S., include all "full time officers and employees who receive compensation for services rendered from state funds..." (§121.02, F.S.). The provisions of said Ch. 121, F.S., are "compulsory as to all persons who enter the employment of the State of Florida on or after July 1, 1947..." (§121.04, F.S.) and when said Ch. 121 is read as a whole we feel that all officers entering state service after said date are within the purview of the said compulsory provision. Legislative service has heretofore been counted when the member was otherwise a member of the state retirement system (§121.041, F.S.). Heretofore members of the legislature only received compensation when the legislature was in general or extraordinary session; now compensation is paid them monthly during their term. We are, therefore, inclined to the view that members of the legislature are now within the purview of said Ch. 121, F.S., as are other state officers. The deductions from state officers compensation required by said Ch. 121, F.S., should be made until the question is clarified by judicial decree or legislative enactment.

Under §14.05, F.S., an Acting Governor receives "the same salary as the Governor would have received during said time." This salary is to the Acting Governor for the performance of the additional duties imposed upon him by law and does not constitute salary to him as president of the senate or speaker of the house of repre-

sentatives as the case may be. When the president of the senate or speaker of the house is exercising the office of governor he continues to be a member of the senate or house of representatives. We are, therefore, of the opinion that he is entitled to both the salary allowed members of the legislature and the salary payable to the Acting Governor. We do not think that subsection (3) of §216.171, F. S., has any application where the salaries in question have been vested in one person by the State Const. and a legislative enactment as is the case where a member of the legislature is Acting Governor.

Although members of the legislature may not hold any other state office (§5, Art. III, State Const.) or federal office (§7, Art. III, State Const.) these constitutional provisions do not prohibit a member of the legislature accepting state employment; for example, attorney for the Racing Commission (*State v. Futch*, 122 Fla. 837, 165 So. 907). We are inclined to the view that where a member of the legislature accepts employment with the state that he is within the purview of subsection (4) of §216.171, F.S., and for his own protection should obtain, or have his employer obtain, the consent and approval required in said subsection.

In the light of the above statutes, authorities and observations, the above stated questions are answered as follows:

1. The provisions of §4, Art. III, of the State Const., as amended at the general election in 1954, constitute a legislative appropriation from the general revenue fund of the state.

2. The said constitutional amendment being within itself an appropriation, the second question is not answered.

3. As the terms of the newly elected senators and members of the house of representatives commenced the day following their election, their compensation would be from said date. The compensation should not be paid persons elected to the legislature until they have qualified as members of the legislature, as aforesaid; and this being true, persons who have not qualified should not be paid unless and until they have qualified, at which time they should be paid salary from the date of their election.

4. We are of the opinion that, since the adoption of the said amendment, members of the legislature are within the purview of Ch. 121, F.S., and should be treated as are other state officers and employees under the said statute. (see Opinion of September 4, 1953; 053-231).

5. The Acting Governor should be paid salary as a Senator and as Acting Governor; and no approval by the State Budget Commission seems to be required.

6. Members of the legislature *may be employed* by the State or any of its agencies (but may not hold another state or county office); it is suggested that State Budget

Commission approval for payment from different state funds be obtained unless and until the question is clarified by court or legislative action.

LEGISLATION

March 31, 1953.—053-77.

STATE REGULATORY BOARDS, COMMISSIONS, ETC.— EXPENDITURES—REGULATION—LIMITATION

QUESTIONS: 1. May the Legislature regulate and limit the expenditures of state licensing, professional and regulatory boards, commissions, agencies, etc., to an amount less than the fees and commissions received by such boards, commissions, agencies, etc.?

2. If such limitation is permissible should it be by separate act of the Legislature or may the limitation be incorporated in a biennial appropriations act?

To: Chairman of Appropriations Committee, Legislature of the State of Florida:

Under §4, Art. IX, of the State Consti., "no money shall be drawn from the Treasury except in pursuance of appropriations made by law." This section of the Consti. has reference to state funds and not to funds held by the State Treasurer in other than his official capacity (*Carlton v. Mathews*, 103 Fla. 301, 137 So. 815; *State v. Caldwell*, 156 Fla. 618, 23 So. 2d. 855, 24 So. 2d. 797). Funds collected for a particular purpose, such as fees and commissions collected to compensate the State for regulation but not for revenue purposes, would seem to be within the State Five Funds Statute (§§215.30, et seq., F. S.) and subject to regulation and appropriation by the Legislature. The Supreme Court of the United States, in connection with the Commerce Clause of the Federal Constitution, has often drawn a distinction between regulatory fees and commissions and taxation for revenue purposes. Fees and commissions charged for regulatory purposes only have usually been held not to constitute a burden on interstate commerce while taxes for revenue purposes have usually been held to be a burden (15 C. J. S. 376, §58). In these cases where the charges have greatly exceeded the cost of regulation, although designated regulatory fees or commissions, they have been held to be taxes and not regulatory fees notwithstanding their designation by the Legislature as regulatory fees.

In most of our regulatory statutes the charges provided in such statutes were designed as regulatory fees or commissions and not as taxes for revenue purposes. However, there is no constitutional provision preventing the Legislature at any time converting them into taxes for revenue purposes. Should the Legislature limit the expenditures of a Board or Commission to an amount greatly below the income of such Board or Commission from fees and commissions, such limitation, in the light of the decisions of the Supreme Court of the United States, might have the effect of changing such charges and commissions into taxes for revenue purposes. However, such a conver-

sion of regulatory fees into taxes for revenue purposes would be purely technical where it does not affect interstate commerce. This is a matter that the Legislature has absolute control over, except in so far as it may be limited by State and Federal constitutional provisions.

The first question is, therefore, answered in the affirmative, subject to the above observations in connection with interstate commerce, and subject to any constitutional provision regulating the question such as of §30 (6), Art. IV, of the State Consti.

Prior to Ch. 25068, Laws of Florida, Acts of 1949, most all regulatory boards, commissions, etc., had continuing appropriations permitting the use of all their income for regulatory purposes; however, these continuing appropriations were repealed by the said 1949 act (see §282.001 and §282.002, F. S.). Fixed appropriations for such boards, commissions, etc., were contained in the 1949 Biennial Appropriations Act, limited, however, to an amount not in excess of the income received by them. The 1951 Biennial Appropriations Act contained a general appropriation for each such board, commission, etc., from the General Fund not limited by their income. The 1951 Biennial Appropriations Act would have had the effect of limiting some of the boards and commissions to an amount less than their incomes except for two facts (1) the fees and commissions charged by them were still levied for regulatory and not revenue purposes and (2) subsection (26) of Section 282.002, F. S., provided that the Budget Commission has power and authority to set up a trust fund necessary to preserve the integrity of any funds received or collected for a particular purpose. If this subsection, in so far as it relates to Regulatory Boards, Commissions, etc., was repealed, the boards and commissions would be limited to the amount fixed by the appropriation even if it had the effect of crippling such regulation. Section 30, Art. III, of the State Consti., provides that the Biennial Appropriations Act may contain no other subject than the appropriation of moneys. There is grave doubt in our mind that a provision repealing or altering said §282.002 (26), F. S., may legally be included in the Biennial Appropriations Act. It might be possible, although we are unable to be definite on that point, for the Biennial Appropriations Act to contain a provision limiting a board or commission to the amount fixed by the Appropriations Act. A statute converting the regulatory fees and commissions into taxes for revenue purposes would also accomplish the same result, as taxes for revenue purposes would not be within the purview of said §282.002 (26). These observations seem to answer the second question.

CHAPTER IV
EXECUTIVE DEPARTMENT
TREASURER

April 27, 1954.—054-103.

**STATE DEPOSITS—SECURITY—FUEL TAX ANTICIPATION
CERTIFICATES—ELIGIBILITY UNDER §2, CH. 28865,
ACTS OF 1953**

QUESTION: May the State Treasurer accept interest bearing fuel tax anticipation certificates, issued under authority of §2, Ch. 28865, Laws of Florida, 1953, as security for deposit of state funds in banks?

To: Honorable J. Edwin Larson, State Treasurer:

Chapter 28865 applies in those counties of the state "having a population in excess of one hundred fifty thousand (150,000) inhabitants according to the last preceding Federal Census." Section 2 of the act is quoted: "Upon resolution of the Board of County Commissioners of any such county, the State Road Department shall be authorized to issue interest bearing fuel tax anticipation certificates, maturing not more than four (4) years from date of issue, payable from the eighty (80%) per cent of such county's gasoline taxes remitted to the State Road Department for expenditure in such county, for the sole purpose of enabling such county to acquire such rights of way."

In explanation it is pointed out that "such rights of way," in the quoted matter refers to the following set forth in Section 1 of said act: "...for the sole purpose of obtaining funds needed by such county to acquire rights of way for primary roads to be constructed in such county under the supervision of the State Road Department."

In my recent opinion 054-50, I construed §2 of said Ch. 28865, recognized the validity thereof and concluded as follows: "In as much as said Chapter restricts the funds anticipated or pledged to the 80% surplus of the second gas tax, it in no wise violates §6 of Art. IX of the State Const."—(With supporting authorities.)

Section 18.111 F. S., provides that: "The state treasurer, acting as such or as ex officio treasurer of any county, board, commission, authority, agency or other instrumentality of the State of Florida, be, and he is hereby, authorized to accept as collateral security for any funds deposited by him, bonds, notes or certificates heretofore or hereafter issued by any county or any board, commission, authority, agency or other instrumentality of the State of Florida which contain a pledge of and are payable solely from the eighty per cent surplus two cents second gasoline tax accruing under §16 of Art. IX of the Const. of the State of Florida, *provided that such securities have*

been approved by the state board of administration as to their legal and fiscal sufficiency." (Italics supplied).

The italicized words in said last-quoted matter are found in effect in §344.261, F. S., relating to a lease-purchase agreement to be entered into, under circumstances set forth therein and in §344.26, F. S., between the State Road Department and a county, road and bridge district, etc., covering any road, bridge, etc.; and such words are used in relation to the bonds or debentures contemplated by the named sections. It is not apparent that such sections of our statutes apply to the instant situation. We are informed that the particular certificates which precipitated this question, have not been approved by the State Board of Administration. However, we know of no reason why, subsequent to the execution of all instruments required for issuance of the interest bearing fuel tax anticipation certificates provided by §2 of Ch. 28865, that the State Board of Administration may not by formal action approve any such certificates as to their legal and fiscal sufficiency, provided such is the determination of said board.

In view of the foregoing, in my opinion the question is answered as follows:

The State Treasurer may accept interest bearing fuel tax anticipation certificates issued under authority of §2, Ch. 28865, Laws of Florida, 1953, as security for deposit of state funds in banks, provided, that such certificates have been approved by the State Board of Administration as to their legal and fiscal sufficiency.

September 24, 1953.—053-257.

COLLATERAL SECURITIES—DEPOSITS OF STATE MONEY UNDER CH. 28133, ACTS 1953

QUESTION: May excess collateral pledged by a bank to the State Treasurer as security for deposits of state money, under and as contemplated by §18.10, F. S., be considered available as security for funds deposited under the authority of Ch. 28133, Laws of 1953?

To: Honorable J. Edwin Larson, State Treasurer:

Chapter 28133, Laws of 1953, authorizes state agencies, boards, bureaus, etc., whose offices are located elsewhere than in the City of Tallahassee, upon written approval of the State Budget Commission, to deposit monies which are collected by them in banks designated by the Governor, Comptroller and Treasurer; that, "All banks so designated shall pledge sufficient collateral to be security for such funds, said securities to be the same type as those prescribed by law as eligible for the purpose of securing the deposits made by the State Treasurer. Said collateral securities shall be deposited with, or pledged to, the State Treasurer in the same manner as set out in Section 18.11, Florida Statutes."

Section 2 of the act specifically refers to revolving funds

authorized by the State Budget Commission for any such state agencies, boards, bureaus, etc., and with respect to such funds it is provided that, "the banks in which such deposits are made shall pledge collateral security in an amount equal to or in excess of the total amount of such revolving funds, said collateral securities to be of the type and pledged in the manner as provided for the pledge of collateral security in §1 hereof.

A reading of §§18.10 and 18.11, F. S., evidences that the security to be furnished by an approved bank as therein contemplated is for the deposit of state monies as to which the Governor, Comptroller or State Treasurer is designated by law as custodian. Chapter 28133 does not purport to authorize the use of securities so required for such deposits of state monies under §§18.10 and 18.11, F. S., to be used also as securities for the deposits of the state agencies, boards, bureaus, etc., as authorized by Ch. 28133.

Hence, the question is answered in the negative.

July 17, 1953.—053-155.

STATE DEPOSITS—SECURITY—BONDS OF NEW JERSEY
HIGHWAY AUTHORITY—ELIGIBILITY—
§§18.10, 18.11, F. S. APPLIES

QUESTION: Are State-Guaranteed Parkway Bonds (Series A) of New Jersey Highway Authority eligible as security for deposits of moneys of the state under §§18.10 and 18.11, F. S.?

To: *Honorable J. Edwin Larson, State Treasurer:*

Section 18.10, F. S., deals, among other things, with designation of banks of the state in which shall be deposited state moneys and security to be furnished by said banks in connection with such deposits. A part of §18.11, F. S. provides: "The security to be given by such banks as may be designated under the preceding section shall consist of bonds of the United States, and the bonds of the several states, county and municipal bonds, and county or county school time warrants, issued by any one of the counties or cities of the State of Florida of the value thereof as may be agreed to by the governor, comptroller and treasurer."

Attached to the request for opinion is an "Advance Copy" of a proposed official statement of the New Jersey Highway Authority concerning these bonds, the statement having printed thereon the following:

"The New Jersey Highway Authority has prepared this document as a Proposed Official Statement and has approved the furnishing of copies thereof to prospective bidders for the Series A Bonds therein described. Upon award of such Series A Bonds, the Authority will approve and authorize an Official Statement substantially in this form and deliver to the successful bidder a signed copy of such Official Statement."

In view of the public body issuing such statement and its assurance of its issuance of an official statement in substantially the same form, reasonably the matters appearing in the proposed official statement may be accepted without question.

Attention is directed to pages 2 and 3 of said statement, particularly the printed matter appearing under the headings "The Authority", "Guaranty of Bonds by the State of New Jersey," "Execution and Effect of the Guaranty," and "Performance of the Guaranty." Notice is taken of the following excerpt from the printed matter appearing under the heading, "Execution and Effect of the Guaranty:"

"Upon such filing of said certificate and record, the punctual payment of the principal of and interest on such bonds shall be, and the same hereby is, unconditionally guaranteed by the State of New Jersey. Such guaranty shall be expressed or endorsed upon such bonds by the signature of the State Treasurer or of any person in the Department of the Treasury appointed by him for that purpose."

In view of the foregoing, in my opinion the above question is answered as follows:

State-Guaranteed Parkway Bonds (Series A), when issued by the New Jersey Highway Authority, and which have endorsed or expressed thereon the guaranty of the State of New Jersey, as contemplated by the above-quoted excerpt, are to be construed as state bonds within the meaning and intent of said §18.11, F. S. So construed as bonds of the State of New Jersey, they will be eligible for the securing of deposits of state moneys, as contemplated by §§18.10 and 18.11, F. S.

February 13, 1953.—053-35.

STATE TREASURER—HOUSING AUTHORITY BONDS—
STATE DEPOSITS—SECURITY—ELIGIBILITY

QUESTION: Are housing authority bonds, as contemplated by §518.09, F. S., eligible as security for deposits in banks as state funds by the State Treasurer?

To: Honorable J. Edwin Larson, State Treasurer:

The relevant part of §518.09, is quoted:

"The state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any

bonds or other obligations issued by a housing authority pursuant to the housing authorities law of this state (chapter 421), or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, and such bonds and other obligations shall be authorized security for all public deposits; . . . provided however, that nothing contained in this section shall be construed as relieving any person from any duty of exercising reasonable care in selecting securities." (Emphasis supplied.)

Sections 18.10 and 18.11 F. S., generally provide for the deposit of such funds and the security required to be pledged by banks in connection with such deposits. The relevant part of Section 18.11, provides:

"The security to be given by such banks as may be designated under the preceding section shall consist of bonds of the United States, and the bonds of the several states, county and municipal bonds, and county or county school time warrants issued by any one of the counties or cities of the state of Florida of the value thereof as may be agreed to by the governor, comptroller, and treasurer."

Attention is also directed to the fact that §653.10, F. S., a part of the chapter dealing with banking regulations, relates to deposit of public monies in banks as therein described subject to regulations of the Comptroller. A consideration of §§18.10, 18.11 and 653.10 leads reasonably to the conclusion that the provisions of §653.10 are not applicable to deposits of public monies by the State Treasurer.

It is to be noted that §518.09 directly mentions the "state and all public officers." These words are construed in connection with the other parts of the section as evidencing legislative intent that the bonds described in the section are eligible to secure the deposit of state monies by the Treasurer. By reason of that conclusion it appears that with respect to the deposit of such funds by the State Treasurer, §518.09 must be read in connection with §18.10 and 18.11.

In view of the foregoing, in my opinion the question is answered as follows:

Bonds issued by housing authorities in this state pursuant to the provisions of Ch. 421, F. S., or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States Government or any agency thereof, are eligible to secure deposits in banks of monies by the State Treasurer. Before acceptance of such securities for said purpose, however, the provision in §18.11 that the value of such bonds shall be agreed to by the Governor, Comptroller and Treasurer, shall be observed.

In view of the public body issuing such statement and its assurance of its issuance of an official statement in substantially the same form, reasonably the matters appearing in the proposed official statement may be accepted without question.

Attention is directed to pages 2 and 3 of said statement, particularly the printed matter appearing under the headings "The Authority", "Guaranty of Bonds by the State of New Jersey," "Execution and Effect of the Guaranty," and "Performance of the Guaranty." Notice is taken of the following excerpt from the printed matter appearing under the heading, "Execution and Effect of the Guaranty:"

"Upon such filing of said certificate and record, the punctual payment of the principal of and interest on such bonds shall be, and the same hereby is, unconditionally guaranteed by the State of New Jersey. Such guaranty shall be expressed or endorsed upon such bonds by the signature of the State Treasurer or of any person in the Department of the Treasury appointed by him for that purpose."

In view of the foregoing, in my opinion the above question is answered as follows:

State-Guaranteed Parkway Bonds (Series A), when issued by the New Jersey Highway Authority, and which have endorsed or expressed thereon the guaranty of the State of New Jersey, as contemplated by the above-quoted excerpt, are to be construed as state bonds within the meaning and intent of said §18.11, F. S. So construed as bonds of the State of New Jersey, they will be eligible for the securing of deposits of state moneys, as contemplated by §§18.10 and 18.11, F. S.

February 13, 1953.—053-35.

STATE TREASURER—HOUSING AUTHORITY BONDS—
STATE DEPOSITS—SECURITY—ELIGIBILITY

QUESTION: Are housing authority bonds, as contemplated by §518.09, F. S., eligible as security for deposits in banks as state funds by the State Treasurer?

To: *Honorable J. Edwin Larson, State Treasurer:*

The relevant part of §518.09, is quoted:

"The state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any

bonds or other obligations issued by a housing authority pursuant to the housing authorities law of this state (chapter 421), or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, and such bonds and other obligations shall be authorized security for all public deposits; . . . provided however, that nothing contained in this section shall be construed as relieving any person from any duty of exercising reasonable care in selecting securities." (Emphasis supplied.)

Sections 18.10 and 18.11 F. S., generally provide for the deposit of such funds and the security required to be pledged by banks in connection with such deposits. The relevant part of Section 18.11, provides:

"The security to be given by such banks as may be designated under the preceding section shall consist of bonds of the United States, and the bonds of the several states, county and municipal bonds, and county or county school time warrants issued by any one of the counties or cities of the state of Florida of the value thereof as may be agreed to by the governor, comptroller, and treasurer."

Attention is also directed to the fact that §653.10, F. S., a part of the chapter dealing with banking regulations, relates to deposit of public monies in banks as therein described subject to regulations of the Comptroller. A consideration of §§18.10, 18.11 and 653.10 leads reasonably to the conclusion that the provisions of §653.10 are not applicable to deposits of public monies by the State Treasurer.

It is to be noted that §518.09 directly mentions the "state and all public officers." These words are construed in connection with the other parts of the section as evidencing legislative intent that the bonds described in the section are eligible to secure the deposit of state monies by the Treasurer. By reason of that conclusion it appears that with respect to the deposit of such funds by the State Treasurer, §518.09 must be read in connection with §18.10 and 18.11.

In view of the foregoing, in my opinion the question is answered as follows:

Bonds issued by housing authorities in this state pursuant to the provisions of Ch. 421, F. S., or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States Government or any agency thereof, are eligible to secure deposits in banks of monies by the State Treasurer. Before acceptance of such securities for said purpose, however, the provision in §18.11 that the value of such bonds shall be agreed to by the Governor, Comptroller and Treasurer, shall be observed.

CHAPTER V
JUDICIARY DEPARTMENT
STATE ATTORNEY; POWERS, DUTIES, ETC.

February 18, 1954.—054-37.

**STATE ATTORNEYS — PROCEEDINGS AGAINST
DEFAULTING COUNTY OFFICERS—LIMITATIONS
ON ACTIONS — §215.11, F. S.**

QUESTIONS: 1. Is §215.11, F. S., in effect a statute of limitation upon actions against defaulting county officers?

2. Where a state attorney fails or refuses to proceed against defaulting county officers, what course should the State Comptroller pursue to enforce the collection of amounts due the county by such defaulting county officers?

To: Honorable C. M. Gay, State Comptroller:

The State Comptroller is required by law to audit and adjust accounts and *claims of the State* against public officers and to institute and prosecute proceedings against such persons for the collection of such claims (§17.04, F. S.) and in his annual report to the Governor he is required to list such defaulting officers (§17.18, F. S.) and to transmit such claims to the proper state attorneys for enforcement and collection (§17.19-17.21, F. S.) notifying the Attorney General of the claims forwarded to such state attorneys (§17.22, F. S.). It is the duty of the state attorney to either collect the claims referred to him or to sue them to insolvency (§27.09-27.13, F. S.). The said Comptroller is required to "report to the state attorney of the proper circuit the name of any delinquent officer...and the state attorney shall proceed forthwith against such delinquent" (§215.04, F. S.). There is no statute setting out the course and procedure where the state attorney, to whom a claim within the above statutes is reported by the State Comptroller, fails or refuses to "collect the claims referred to him or to sue them to insolvency." It seems that the State Comptroller has complied with the statute when he transmits the claim to the state attorney, notifies the Attorney General of the forwarding of such claim to the state attorney, and reports the delinquency to the Governor in his Annual Report.

Under §215.11, F. S., "the Comptroller shall, within ninety days after the expiration of the term of any tax collector, sheriff, clerk of the circuit or criminal court, treasurer or any other officer of any county, *who has the collection, custody and control of any state funds*, who shall be in arrears in his accounts with the State, make up and forward to the clerk of the circuit court of such county a statement of his accounts with the State." §§215.12 and 215.13, F. S., relate to the duties of the clerk circuit court in this connection and the effect of a criminal

judgment against the defaulting officers. These statutes seem to relate to accounts of officers with the State; accounts of such officers with the county are not expressly mentioned. Said §215.11, F. S., was derived from Ch. 3854, Laws of Florida, Acts of 1889, title to which was "An Act to further define the duties of the Comptroller and the Clerks of the Circuit Courts in this State." The said Act, as does the said §215.11, relates entirely to the duties of the State Comptroller and the Clerks of the Circuit Courts and is not a limitation upon actions against defaulting officers.

In the light of the above statutes, authorities and observations:

1. It is apparent that §215.11, F. S., is not a statute of limitations, but is at the most a direction to the State Comptroller and his default cannot be taken advantage of by a defaulting office. The duty of the Comptroller appears to be a continuing one which should be performed, even if tardy.

2. After the State Comptroller has transmitted a claim to the proper state attorney, notified the Attorney General thereof, and included such delinquency to the Governor, it seems that he has complied with the requirements of the statutes. The state attorney is the statutory legal representative of the State Comptroller in these matters, and where he fails or refuses to make collection or sue the claim to insolvency, we find no statute by which the State Comptroller may pursue the matter further, other than to include the delinquency in his report to the Governor. The Governor, under his constitutional power to "take care that the laws are faithfully executed," might direct such further procedure as he deems proper.

July 17, 1953.—053-158.

MUNICIPAL COURT—APPEALS TO CIRCUIT COURT

QUESTION: Where a person convicted of an offense in a municipal court appeals to the circuit court pursuant to the provisions of §932.52, F. S., does §27.02, F. S., or any other law, impose upon the state attorney the duty to represent the municipality or the person taking the appeal in the circuit court?

To: Hon. Murray Sams, State Attorney, DeLand, Florida:

Section 27.02, F. S., provides:

"Duties before court.—The state attorney shall appear in the circuit court within his judicial circuit, and prosecute or defend *on behalf of the state all suits, applications or motions, civil or criminal in which the state is a party.*" (Emphasis supplied).

Said §27.02 does not require the state attorney to appear in a case in the Circuit Court unless the state is a party to the

case, in which event he appears on behalf of the state and not on behalf of anyone else. The state is not a party to a case which is appealed to the Circuit Court from a municipal court and therefore §27.02 does not require the state attorney to handle an appeal to the Circuit Court from a conviction in a municipal court.

Section 932.52, F. S., imposes no duty upon the state attorney to represent either the municipality or the person taking the appeal in such a case, and I know of no statute or rule of law imposing such a duty.

It is my opinion that your question is properly answered in the negative.

CLERK OF THE CIRCUIT COURT

March 19, 1954.—054-70.

CLERK OF THE CIRCUIT COURT—OFFICE RECORDS—DEATH CERTIFICATES

QUESTION: Is a death certificate entitled to be officially recorded in the office of the Clerk of the Circuit Court?

To: *Honorable Avery W. Gilkerson, Clerk of Circuit Court, Pinellas County, Clearwater, Florida:*

You have furnished us a photostatic copy of what appears to be a certificate of death, Department of Public Health, State of Tennessee. You raise the question of the lack of certain formalities in connection with the certification appended to the bottom of said copy.

Sections 28.21 and 28.22 designate the record books which are required to be kept and maintained by the Clerk of the Circuit Court. There are other statutes dealing with recording of various instruments in the office of the Clerk of the Circuit Court. An examination of all the statutes pertaining to recording required in that office fails to reveal any duty cast upon the Clerk to record a death certificate in his official records. The Clerk's Manual is silent on the subject.

Hence, the question is answered in the negative.

We do not here determine the propriety of the Clerk placing a death certificate in his records, since we recognize that as a matter of accommodation and in an effort to be of assistance to the public, the practice has been followed. This opinion, therefore, deals only with the question of whether or not a certificate of death is entitled to be officially recorded in the public records of your office.

April 19, 1954.—054-92.

COUNTY CLERK'S ASSOCIATION—ATTENDANCE—
EXPENSES—PAYMENT

QUESTIONS: 1. May the Board of County Commissioners pay the necessary expenses of a clerk of the circuit court incurred while in attendance at the state convention of county clerks?

2. May the Board of County Commissioners pay the necessary expenses of an officer of the Florida County Clerk's Association incurred while in attendance at a duly called meeting of the officers of said association?

To: *Honorable C. Burton Marsh, Clerk of the Circuit Court, Sumter County, Bushnell, Florida:*

As to Question One

In Opinion 051-303 (Biennial Report of Attorney General 1952-53, page 51), copy of which is attached, we held that dues of the Florida Sheriffs Association are a proper charge against the expenses of the sheriff's office. It was pointed out that the practice of charging dues as an expense of the office has been followed by most state agencies and county officials for many years.

It has also been the practice for a great number of years, which practice is recognized by the State Auditor, that a county fee officer may charge his necessary expenses incurred while in attendance at the state convention of his organization, to the expenses of his office. Certainly then you may properly charge your necessary expenses, as contemplated by the question, against expenses of your office.

In *Adams v. Lott*, 112 Fla. 49, 150 So. 596, the Supreme Court held that a Board of County Commissioners might properly pay the expenses of a member to Tallahassee where he attended public hearings of the State Road Department in connection with the construction of roads in the various counties of the state. Your attendance at a convention of county clerks pertains to the affairs of your office, and not to the business of the Board of County Commissioners. Unless your travel is on behalf of and under the direction of the Board of County Commissioners, I know of no authority by which your expenses can be paid by that board. As stated above, it seems to me that you must look solely to the income of your office for the payment of your necessary expenses.

The question is accordingly answered in the negative.

The answer to the first question necessarily governs the second, which must also be answered in the negative.

June 8, 1953.—053-122.

CLERK OF THE CIRCUIT COURT—FEE
FOR MAILING PROCESS

QUESTION: Under §28.241(1), F. S., 1951 (Ch. 26931, Laws of Florida, 1951) the Clerk of the Circuit Court, in civil cases, receives a flat fee of \$7.50 plus \$.25 for each defendant in excess of five. Is he entitled to make an additional charge for the necessary postage required to mail the initial pleading in causes where the defendants are numerous, such as in suits to quiet title, and the initial pleading is bulky?

To: Honorable J. Frank West, County Attorney, Levy County, Bronson, Florida:

Under Florida Equity Rule 5(g) and (h), which rule became effective January 1, 1950, the plaintiff is required to furnish the clerk, in cases of constructive service, copies of the initial pleading, to be mailed by the clerk with notice of institution of the suit, to all parties whose addresses are known. Hence, at the time of enactment, of §28.241, F. S., 1951, the then existing practice required the clerk to mail a copy of the initial pleading furnished him by the plaintiff's attorney.

In opinion 052-6, copy of which is enclosed, we construed a special act relating to the Clerk of the Circuit Court of Highlands County, which contained the identical language as that appearing in §28.241, F. S., 1951, except the proviso in paragraph 1 thereof. We held that postage was not included in "services." However, it was suggested that where the postage is nominal, the clerk might well pay it from his flat filing fee.

In Opinion 051-312, copy of which is enclosed, the proviso appearing in paragraph 1 of §28.241, F. S., 1951 was discussed. We held that it was the intention of the legislature to increase fees to be paid clerks by \$.25 for each defendant in excess of five in number, because of the additional paper work, etc., involved in such cases.

Following the opinions above mentioned, we feel the clerk is entitled to the \$7.50 flat filing fee plus \$.25 for each defendant in excess of five in number, and in addition, he is entitled to the actual and necessary postage required to mail the initial pleading in compliance with Equity Rule 5, except where the postage is nominal. In that event, such nominal postage should be absorbed by the clerk. Should counsel require the initial pleading to be forwarded by registered mail, the clerk may properly demand the necessary additional postage to cover registry fees, at the time of the institution of the suit.

February 5, 1954.—054-26.

CLERK'S FEE—FORECLOSURE OF MORTGAGES—
§702.02, F. S.

QUESTION: Is a clerk of the circuit court, for performing

duties under Ch. 28093, Laws of Florida, 1953, entitled to any fee in addition to the \$5.00 therein provided?

To: Honorable Bryan Willis, State Auditor:

We are here simply placing in official opinion form our letter to Honorable E. B. Leatherman, Clerk of Circuit Court, Dade County, dated August 27, 1953, pertaining to the identical question.

Chapter 28093, Laws of Florida, 1953 amends §702.02, F. S., 1951, and pertains to the foreclosure of mortgages. A reading of the act indicates an attempt to simplify foreclosure proceedings, as well as to eliminate certain costs and fees which before had been allowed Special Masters appointed by the court for the purpose of enforcing the final decree of the court. The act is comprehensive, governing the entire foreclosure procedure. The Clerk of the Court has been substituted for the Special Master in the matter of making sale.

Section 1 (2) of the act, after providing for the sale of the property pursuant to a final decree, contains the following language: "For his services in making such sale, the Clerk shall receive a fee of Five Dollars (\$5.00)." Of course, there are other services required of the Clerk after the actual sale, including the certificate of sale [§1(3)], as well as the issuance of the certificate of title and certificate of disbursements [§1(4)]. Said paragraph (4) requires the Clerk to disburse "...the proceeds of the sale in accordance with the provisions of the final decree of foreclosure..." and to file a report of such disbursements.

Sections 54.04 and 54.05, F. S., 1951, pertain to money paid into the registry of the court. It is to be noted that any sum so deposited can be withdrawn only upon the voucher signed by the Judge and countersigned by the Clerk (§54.05). As noted above, paragraph (4) of §1, Ch. 28093, Laws of Florida, 1953 requires the Clerk to disburse the proceeds of the foreclosure sale. There is no indication that the sums received by the Clerk from the sale are to be deposited into the registry of the court and withdrawn by virtue of §54.05, F. S., 1951. Only moneys received into and paid out of the registry of the court are subject to the fee provided in §28.24, F. S., 1951.

To conclude, I take the view that the \$5.00 fee allowed by Ch. 28093, Laws of Florida, 1953, is intended to be all inclusive so as to cover all duties required of the Clerk under the terms of the act, and that the disposition of the proceeds from the sale is simply one step in connection with such duties.

Hence, the question is answered in the negative.

February 22, 1954.—054-40.

COMMISSIONS ON FUNDS DEPOSITED IN COURT—
CONDEMNATION PROCEEDINGS

QUESTION: Where condemnation proceedings are instituted

under Ch. 73, F. S., and the petitioner files a declaration of taking under Ch. 74, F. S., and thereafter, pursuant to the statutory procedure, deposits not less than double the appraised value of the property with the Clerk of the Circuit Court, is the Clerk, by reason of the language "No sums so paid into court shall be charged with commissions or poundage" found in §74.06, F. S., prohibited from charging the fee or commission allowed by §28.24, F. S., upon sums deposited in the registry of the court?

To: Honorable Bryan Willis, State Auditor, Tallahassee:

Upon first consideration, the language quoted from §74.06 would appear to have the effect of excepting eminent domain proceedings from the fee, or commission granted the clerk by §28.24, F. S. The pertinent part of the last mentioned statute reads:

"Moneys, receiving into registry, and paying out first
\$500.00, per cent 1
Each subsequent \$100.00, per cent 1/2

It is also the law of Florida that fee statutes are to be strictly construed (*Bradford v. Stoutamire*, 38 So. 2d 684). In fact, my immediate predecessor in office ruled that the clerk in a similar situation, was precluded from charging the fee by reason of §74.06, F. S. (Biennial Report 1943-1944, page 134).

In Opinion 052-164 (Biennial Report 1951-1952, page 42) we discussed several questions relating to payment of clerk's fees upon moneys deposited into the registry of the court. We held that where moneys are so deposited by order of court, the fee might not be charged to the condemnee. We did not attempt to consider the language in said §74.06 now before us.

The petitioner in eminent domain is required to pay "into court for use of the defendant..." the compensation awarded by the jury (§73.13, F. S.). The moneys thus deposited are disposed of in the manner provided by §54.04 and 54.05, F. S. Certainly, in such a case the clerk is entitled to the fee or commission under §28.24, F. S.

It is also clear that the proceedings contemplated by Ch. 74, F. S. cannot stand alone for as the title to the chapter indicates, the declaration of taking is a supplemental proceeding and is to be considered ancillary to the main cause in eminent domain. Consequently, logically, how can the clerk be entitled to a fee or commission in a case where an eminent domain proceeding alone is filed, that is, without a declaration of taking, but not where petition by way of a declaration of taking is filed supplementary to eminent domain. That conclusion and interpretation could not be considered consistent. Too, the declaration of taking is merely permissive and actually works for the convenience of the condemnor.

However, as was pointed out in Opinion 052-164, the petitioner in condemnation should not be penalized for complying with the mandate of the statute, requiring him to deposit double the appraised value of the property into the registry of the court.

I conclude that the clerk of the court in eminent domain, is entitled to the fee and commission provided by §28.24, F. S., upon the sums actually paid out of the registry in order to meet the award fixed by the jury under §73.11, F. S., and the judgment of the court following, as provided by §73.12, F. S. That the balance, if any, remaining in the registry of the court, deposited by the petitioner under the mandate of §74.08, F. S., not necessary to satisfy the award and judgment, is not in effect a "paying out" under §28.24 F. S., but is merely a return of the petitioner's money. In other words, the clerk is not entitled to a fee upon the excess so deposited.

For convenience, the clerk might, if he saw fit, deduct his earned commissions from the sum to be returned to the petitioner.

Subject to these limitations and observations, the question is properly answered in the negative.

OFFICIAL COURT REPORTERS

September 28, 1953.—053-253.

OFFICIAL COURT REPORTERS—SERVICES— COMPENSATION AND EXPENSES—AMENDED §§29.03, 29.04, F. S. APPLICABLE

QUESTION: Does §1, Ch. 28275, General Laws of 1953, apply to Ch. 21720, General Laws, 1943, in the matter of fees for services?

To: *Miss Sylvia B. Barnett, Official Shorthand Reporter, Criminal Court of Record, Jacksonville, Florida:*

It will be noted that Ch. 28275, General Laws, 1953, is an Amendment of §§29.03 and 29.04, F. S., 1951, as stated in the title of the act in these words:

"An act to amend Sections 29.03 and 29.04, Florida Statutes, 1951, relating to compensation for services and salaries, expenses and duties of *official circuit court reporters*, and excepting certain counties from this act, and including the constitutional court of record in and for Escambia County." (Emphasis supplied.)

It is true that §1, Ch. 28275, General Laws of 1953, applies to official circuit court reporters, with the exception noted in §4 of said chapter. This section of this act throughout its history, back to its derivation in §3, Ch. 5122, General Laws, 1903, has applied to *official circuit court reporters*. (Emphasis supplied)

Therefore, since §29.03, F. S., 1951, applied to Chapter 21720, General Laws, 1943, by reference, or adoption, it follows that §1, Ch. 28275, General Laws, 1953, still applied by the same reference. The principle of law that governs where one statute adopts provisions of another statute by reference to the law generally which governs a particular subject is stated by Justice Buford

in the case of *Williams et al. v. State ex rel, Newberger*, 125 So. 358, in the following words:

"(1) In 25 R. C. L. p. 908, the writer supported by ample authority, says:

"...when the adopting statute makes no reference to any particular statute or part of statute by its title or otherwise, but refers to the law generally which governs a particular subject, the reference in such a case includes not only the law in force at the date of the adopting act, but also all subsequent laws on the particular subject referred to, so far at least as they are consistent with the purpose of the adopting act."

I am of the opinion that your question is answered in the affirmative.

SHERIFFS

November 17, 1953.—053-311.

DEPUTY SHERIFF—ALCOHOLIC BEVERAGE SALES— CONNECTION WITH PROHIBITED—§561.25, F. S.

QUESTION: Do the provisions of §561.25, F. S., prohibiting certain designated officers and employees, including a sheriff, from engaging in or being in anywise connected with or interested in the sale or distribution of alcoholic beverages or distilled liquors, also apply to a deputy sheriff?

To: *Honorable John A. Madigan, Jr., Attorney, Florida Sheriffs Association, TALLAHASSEE:*

Section 561.25 reads:

"No officer or employee of the state beverage department, and no *sheriff* or other officer with state police power granted by the legislature, shall be permitted to engage in the sale of liquors or beverages provided under the beverage law, nor shall they be employed directly or indirectly, in connection with the operation of any business licensed under the beverage law. Nor shall they be permitted to own any stock or interest in any firm, partnership or corporation dealing wholly or partly in the sale or distribution of alcoholic beverages or distilled liquors, and the violation of this provision shall be deemed a misdemeanor, and upon conviction shall automatically be removed or suspended from office and fined not less than five hundred dollars or imprisoned for six months." (Emphasis supplied)

It is to be determined whether or not the legislature intended by the use of the word "*sheriff*", that his deputies should be included within the statutory provisions. In Opinion 051-416, where the status of a deputy sheriff was discussed, we said in part:

"While a deputy sheriff is not a public officer, he has the power to perform every function of the office of sheriff, except one, the power to appoint a deputy (Guarantee Trust and Safe Deposit Co. vs. Buddington, supra). There is no relationship of master and servant or principal and agent existing between a sheriff and his deputy, who generally are regarded as one and the same, the sheriff acting through his deputy (Holland for the Use and Benefit of Williams vs. Mays, 155 Fla. 129, 19 So. 2d 709). Thus, while technically a deputy sheriff is not a public officer in a constitutional sense, he is more than an employee, and in so far as his functions in relation to the public are concerned, they should be considered as the functions incident to a public office, viz, the office of sheriff."

It is to be noted that I consider a deputy sheriff the alter ego of the sheriff. Consequently, a deputy sheriff comes within the prohibition of §561.25, F. S.

The question is accordingly answered in the affirmative.

July 15, 1954.—054-175.

**SHERIFFS—CAPIAS—SERVICE OF PROCESS—
AUTHORITY UNDER §907.01, F. S.**

QUESTION: Who is authorized to serve a capias when issued by a trial judge under §907.01, F. S.?

To: Honorable R. L. Kendrick, Sheriff, Escambia County, Pensacola, Florida:

Section 907.01, F. S., reads as follows:

"907.01 *Capias and amount of bond.*—Upon the filing of an indictment or information, if the person named therein is not in custody or at large on bail for the offense charged, the judge shall direct the clerk to issue immediately or when so directed by the prosecuting attorney, a capias for the arrest of such person. The judge upon the filing of the information or indictment, shall indicate the amount of bail, if the offense is bailable, in which case an indorsement shall be made on the capias and signed by the clerk, to the following effect: The defendant is to be admitted to bail in the sum of _____ dollars."

Section 30.15 contains the following provision which is pertinent to your inquiry, viz:

"30.15 *Powers, duties and obligations.*—Sheriffs, in their respective counties, in person or by deputy, shall:

"(1) Execute all process of the supreme court, circuit courts, courts of record, civil courts of record, county courts, criminal courts and boards of county commissioners, of this state, to be executed in their counties;"

A *capias* issued under §907.01 is a process. The only courts in which such process can be issued under said statute are the circuit courts criminal courts of record, courts of record and county courts, there being no other courts in which either an indictment or an information can be filed. The above quoted provision of §30.15 requires that *all process* of these courts be executed by the sheriffs. Therefore, it is my opinion that only the sheriffs, in person or by deputy, may serve *capiases* issued pursuant to the provisions of §907.01.

This opinion accords with opinion No. 047-43, dated February 18, 1947, rendered to you by my predecessor in office, Hon. J. Tom Watson. (Attorney General's Biennial Report, 1947-1948, pp 44-45).

October 19, 1953.—053-279.

SHERIFFS—DEPUTY SHERIFFS—APPOINTMENT
AS DEPUTY U. S. MARSHALL

QUESTIONS: 1. Does Art. XVI, §15 of the Florida Const. prohibit a sheriff from holding an appointment as Deputy United States Marshall?

2. Does Art. XVI, §15 of the Florida Const., prohibit a deputy sheriff from holding an appointment as a Deputy United States Marshall?

To: *Honorable John A. Madigan, Jr., Attorney, Florida Sheriffs' Association, Tallahassee, Florida:*

Article XVI, §15 of the Florida Const. provides in part: "No person holding or exercising the functions of any office... under the Government of the United States... shall hold any office of honor or profit under the government of this state..."

In the early case of Attorney General *ex rel* Wilkins v. Conners, 27 Fla. 329, 9 So. 7, the court was considering whether or not a sheriff might also serve as city marshal. While the point decided was that a municipal officer does not fall within Art. XVI, §15, it apparently was conceded that a sheriff was an officer within the meaning of the Article. The court at page 9 said:

"... County officers, being in express terms created and provided for by the constitution of the state as part of the machinery of the state's government in their respective counties, are to be regarded, strictly speaking, as officers of the state."

It, therefore, remains to be determined whether or not a Deputy United States Marshall holds or exercises the functions of an office under the Government of the United States. Title 28, §541, U.S.C.A. provides the President shall appoint, subject to confirmation of the Senate, a United States Marshall "for each judicial district." The Marshall, by authority of the Attorney General, may appoint deputies, who are subject to removal by the Marshall "pursuant to civil-service regulations" (§542, Title 28, U.S.C.A.). It seems to me that since the deputy marshall is

a mere appointee, subject to removal by the marshall, he does not hold an office "under the Government of the United States," within the meaning of Art. XVI, §15. See *Powell v. U. S.* (C. C. Ala. 1894) 60 F. 687, where the court said that it is difficult to see how a deputy marshall is other than an employee of the marshall.

In Opinion 051-277, copy of which is enclosed, we held that a deputy sheriff does not occupy an office under the government of the state within the purview of Art. XVI, §15 of the Const.

There remains to be determined whether or not the employment as a Deputy United States Marshall may be inconsistent with the duties of sheriff or deputy sheriff so as to be contrary to public policy. Should the Deputy United States Marshall receive no compensation, and the duties required of him be occasional and purely incidental so as to in no way interfere with his functions as a county law enforcement officer, then I can see no legal objection to the arrangement. Your letter indicates that his services will be a mere accommodation to the United States. The sheriff and his deputy are first and foremost bound to enforce the laws of the State of Florida, and no position can be sanctioned where there is any possibility of divided allegiance.

Subject to the above observations, both questions are answered in the negative.

September 16, 1953.—053-242.

SHERIFF'S FEES—INVESTIGATION OF CRIMES

QUESTION: Is a sheriff or his deputy, who makes more than one investigation of crime on the same day, under Section 30.24, Florida Statutes, 1951, entitled to the \$6.00 per diem for each crime investigated?

To: *Honorable Bryan Willis, State Auditor:*

The pertinent portion of §30.23, F. S., 1951 reads:

"Investigation of crime when made under the direction of the judge of any court having criminal jurisdiction, or of the state's attorney, county solicitor or other prosecuting officer, per day for sheriff or per day per deputy (to be approved by the court).....6.00"

We held, in opinion 052-299 (A. G. O. 1951-1952, page 62) that where a constable is designated the executive officer of both a justice of the peace court and a county judge's court, he is, if he performs duties as executive officer in each court during the same day, entitled to two attendance fees under §30.24, F. S., 1951. It was further pointed out that regardless of how many times the executive officer attended court on the same day, he would be entitled to but one per diem for each court.

No mileage fees or expenses are authorized in connection with investigations under §30.24, F. S., 1951 (Sheriff's Manual, page 201; A. G. O. 1941-1942, page 36). The investigation con-

templated under the statute is not one of the choice of the sheriff, for he is entitled to the fee only where directed by the judge of a court having criminal jurisdiction, the state attorney, county solicitor or other prosecuting officer and finally after approval is given by the court. It is entirely possible that a sheriff or his deputy might be directed to make several investigations at points in the county widely separated from each other, for which he will receive no mileage fees or expenses.

Accordingly, we believe that under such circumstances the sheriff may properly be allowed, after approval by the court, a \$6.00 per diem for each investigation conducted by him in a given day. Hence, the question is answered in the affirmative.

September 3, 1953.—053-229.

SHERIFF'S FEES—ARRESTS BY HIGHWAY PATROL

QUESTIONS: 1. Can a sheriff or constable receive any fees involving arrests while in the presence of a highway patrolman?

2. If a highway patrolman makes an arrest on the highway, is it legal for him to deliver the person arrested to the sheriff at the scene of arrest?

3. If the answer to question 2 is "yes", is the sheriff entitled to mileage for transporting the prisoner to jail?

To: *Honorable Aubrey McDonald, Sheriff, Walton County, De-Funiak Springs, Florida:*

Chapter 28119, Laws of Florida, 1953, amending §321.05, F. S., provides "no sheriff or constable shall be paid any arrest fee for the arrest of a person for violation of any section of Chapter 317 when the arresting officer was transported in a Florida highway patrol car to the vicinity where the arrest was made; and no sheriff or constable shall be paid any fee for mileage for himself or a prisoner for miles traveled in a Florida highway patrol car."

As to Question I:

Limiting the answer to cases where the arresting officer is not a highway patrolman and is transported to the vicinity of the scene of arrest in a highway patrol car and the arrest is for a violation of any section of Ch. 317, F. S., the answer is in the negative.

As to Question II:

Section 321.05(4), F. S., as amended, requires the patrol officer to deliver forthwith the person arrested to the sheriff of the county or obtain a recognizance, a cash bond or other suitable security conditioned for the appearance of the arrested person to answer the charges. I find no statute specifying the place of delivery of the prisoner to the sheriff. It seems reasonable, however, that the law contemplates under ordinary circumstances, the delivery shall be made at the county seat. It is conceivable that emergency or extraordinary circumstances

may arise necessitating the delivery to be made at some other place.

As to Question III:

In Opinion 047-256, of my predecessor, copy of which is enclosed, and in which I concur, it was stated that the sheriff is entitled to fees for services rendered by him only after the moment of delivery of the arrested person or the bond to him. See also *Bradford v. Stoutamire*, 28 So. 2d 684. Chapter 28119, Laws of Florida, 1953, quoted above, prohibits mileage for sheriffs, constable or prisoner for any miles traveled in a highway patrol car. Constructive mileage is prohibited by §30.27, F. S. Subject to those limitations and to the prohibition of payment by the county commissioners of any illegal or unnecessary item (§142.11, F. S.), the answer to question 3 is in the affirmative.

June 17, 1953.—053-126.

SHERIFFS—NET INCOME—OFFICE EXPENSES—FEEDING PRISONERS—CONTRACT WITH COUNTY COMMISSIONERS—§§145.02, 145.03, F. S.

QUESTION: Do the receipts and expenses of the sheriff, as a result of contract with the board of county commissioners for the feeding of prisoners worked on county roads affect the income of his office under Ch. 145, F. S.

To: Honorable Bryan Willis, State Auditor, Tallahassee, Florida:

Your letter refers to the answer to question one of Opinion 051-268, which held substantially that it was a matter of contract between the sheriff and the board of county commissioners as to what amount, under the provisions of §951.03, F. S., the board shall pay for feeding county prisoners for working on the county roads.

The powers, duties and obligations of the sheriffs of this state are enumerated in §30.15, F. S. Although this statute does not specifically provide that it shall be the duty of the sheriff to feed county prisoners working on county roads, it is felt this duty would be imposed on the sheriff when directed by the board to feed such prisoners under the provisions of §30.15(5). The compensation in such an instance would be the amount agreed upon between the sheriff and the board as expressed in question one of Opinion 051-268.

Since the sheriff would be feeding such prisoners in the performance of one of his official duties, it is my opinion that the amount contracted for the feeding of these prisoners would be "other remuneration" as contemplated by §145.03, F. S., and therefore be income of his office. The sheriff, however, in determining the net income under §145.02, would be able to deduct the amount actually expended for the purchase of food for feeding the prisoners as a necessary expenditure of his office.

CRIMINAL COURT OF RECORD

September 8, 1954.—054-216.

JUDGE'S AUTHORITY—APPOINTMENT OF
COUNTY SOLICITOR

QUESTION: During a term of court, does the judge of the Criminal Court of Record have authority to appoint a county solicitor pursuant to the provisions of §32.17, F. S., when the county solicitor is present in the county and physically able to perform his duties but, because of vacation or other reason, is not in his office and is not desirous of performing his duties for short period of time?

To: *Honorable John D. Marsh, County Solicitor, Miami, Dade County, Florida:*

It has long been the settled law of Florida that even in the absence of statute trial courts having criminal jurisdiction have an inherent power, in the exercise of such jurisdiction, to appoint someone to represent the interests of the State temporarily during the absence or inability to act of the regularly chosen officer whose official duty it is to so represent the interests of the State. (King v. State, 31 So. 254).

The Supreme Court has even gone so far as to say that the Circuit Court has implied power to appoint a member of the bar to appear before the grand jury when the state attorney, although in attendance upon the court, refuses to discharge his duties. (Taylor v. State, 38 So. 380).

In Pelaez v. State, 144 So. 364, the Supreme Court recognized the authority of the Judge of a Criminal Court of Record to appoint an acting county solicitor "to temporarily perform the duties of that office in case of exigency", to "make an emergency appointment of a suitable person to perform the duties of an official prosecutor for the state during a term or part of a term of court when the duly commissioned prosecuting officer is for some valid reason temporarily unable to perform his official functions." In that case the Supreme Court said that the jurisdiction of the trial court to proceed cannot be delayed by the absence or the inability of a court officer to perform his duties.

The governing statute, §32.17, F. S., provides as follows:

"Whenever there shall be a vacancy in the office of county solicitor in any of the counties of this state in which a criminal court of record is established, either by reason of nonappointment or otherwise, or if a county solicitor shall not be present at any term of the court, or, being present, shall from any cause be unable to perform the duties of his office, the judge of said court shall have full power to appoint a county solicitor from among the members of the bar with the consent of such member so appointed, to whom shall be administered an oath to faithfully discharge the duties of county solicitor,

and who shall have as full and complete authority, and whose acts shall be in all respects as valid, as a regularly appointed county solicitor. He shall sign all informations and other papers as acting county solicitor. The power of said appointee shall cease upon the filing of said office by appointment or upon the ability of the county solicitor to perform the duties of his office, a note of which shall be entered upon the minutes of the court. The compensation of such appointee shall be the same as that of the regularly appointed county solicitor, and shall be paid by the regular county solicitor, and not by the county or state, in those cases in which the temporary appointment is made by reason of the absence, inability, or disqualification of the regular county solicitor."

In the light of the said statute and of the above cited cases, it is my opinion that your question is properly answered in the affirmative. All that the statute requires as a predicate for such an appointment is that the county solicitor "not be present at any term of the court." The statute doesn't say that the judge can't make the appointment unless the absence is due to this reason or that reason or that he can't make it if the county solicitor is present in the county, and I don't think that it matters why he is absent or whether he is in or out of the county. It is his absence at a term of the court that matters, nothing else.

COUNTY JUDGE'S COURT

April 14, 1954.—054-83.

COUNTY JUDGE'S COURT—PROSECUTING ATTORNEYS—JURISDICTION

QUESTIONS: 1. Is it the duty of the prosecuting attorney in the County Judge's Court to prosecute violations of §798.01, F. S., relating to living in open adultery?

2. Does a county prosecuting attorney prosecuting in the County Judge's Court have authority to summon witnesses for investigations or in order to prepare cases for trial and, if he does have such authority, how would such witnesses be paid?

3. Is there a statute under which a prosecution may be maintained against a prisoner who escapes from a city or county jail prior to arraignment or prior to conviction, forcibly and solely through his own efforts, and where the law enforcement officers lose sight of the escapee?

4. If the answer to question three is in the negative, how should an affidavit be framed to charge such an escapee with the common law offense of escape?

To: Honorable J. Burnham Reilly, Prosecuting Attorney, Eustis, Florida: ①

As to Question One:

The County Judge's Court has no jurisdiction to try any offenses except misdemeanors. See (§36.01, sub-paragraph 4, F. S., as amended in 1953). §798.01, F. S., prohibiting living in open adultery, specifies that the penalty shall be "by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars." The term "felony" is defined by Art. 16, §25, Const. of Florida, as follows:

"The term felony, whenever it may occur in this Constitution or in the laws of the State, shall be construed to mean any criminal offense punishable with death or imprisonment in the State Penitentiary."

Since the offense of living in open adultery denounced by §798.01 is "punishable" by imprisonment in the state prison, said offense is a felony and the county judge's court has no jurisdiction to try a person charged with said offense. Therefore, your Question One is answered in the negative.

As to Question Two:

I find no constitutional or statutory authority for a prosecuting attorney in a county judge's court to summon witnesses before him for any purpose. It has always been the generally accepted doctrine that such prosecuting attorney's have no such authority. Therefore, in my opinion your Question Two is properly answered in the negative.

As to Question Three:

Although §954.30, F. S., prescribes the punishment for the escape of a *state prisoner*, I find no statute which penalizes the escape of *county prisoners*. However, a county prisoner may be charged with the common law offense of escape if at the time of the escape "the prisoner was held in lawful custody of a valid charge of a criminal offense or upon a conviction of a criminal offense". (State ex rel Farrior v. Faulk, 136 So. 601). I doubt that a prisoner in a city jail, charged merely with the violation of a city ordinance, is charged with a criminal offense. (See Roe v. State, 119 So. 118).

As to Question Four:

When it is desired to charge with the common law crime of escape a prisoner who escapes from the county jail prior to conviction and gets beyond the sight of the law enforcement officers, I think that the charging part of the affidavit, information or indictment may properly be stated as follows:

"That on the _____ day of _____, 1954,
in _____ County, Florida, one _____
_____, who was then and there a prisoner
under arrest in the County Jail of said County and in
the lawful custody of _____,

who was then and there the sheriff of said county, on a valid charge of having committed the criminal offense of _____, did then and there unlawfully escape from said county jail and from the custody and out of sight of the said _____, sheriff as aforesaid."

August 6, 1953.—053-192.

COUNTY JUDGES—CONSTITUTIONALITY OF STATUTES—AUTHORITY

QUESTION: Does a county judge have the power and authority to pass upon the constitutionality of a statute under which a prosecution is brought in the County Judge's Court, where such constitutionality is challenged by motion to quash the complaint?

To: *Honorable Wilbur F. Osburn, County Judge, Crestview, Florida:*

16 C. J. S. 206-207 Constitutional Law, §93-b points out that in some jurisdictions certain inferior courts are forbidden by constitutional or statutory provisions to pass on the constitutionality of statutes and then goes on to say:

"In the absence of such provisions, it is the rule, under the American constitutional theory, that inferior courts, including even those of original jurisdiction, have power to pass on the validity of a statute and to declare it unconstitutional in proceedings before them in the course of judicial administration. The exercise of such power, however, should be carefully limited, and avoided, if possible, and, unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered the better practice for the court to assume that it is constitutional until the contrary is declared by a court of appellate jurisdiction, especially where the statute is of great importance and far-reaching effect, has been in effect for an appreciable period of time, and has been followed in innumerable cases involving the rights of property. In a proper case, however, the court should not hesitate to determine the constitutionality of a statute, if this be necessary..."

11 American Jurisprudence 714-715 Constitutional Law, Section 88, says:

"In accordance with principles which are basic, the rule is fixed that the duty in a proper case to declare a law unconstitutional cannot be declined and must be performed in accordance with the deliberate judgment of the tribunal before which the validity of the enactment is directly drawn into question..."

* * * * *

"The duty so cast is imposed upon all the courts to uphold both the Federal and state Constitutions..."

I find no constitutional or statutory provision in Florida which forbids County Judges to pass upon the constitutionality of statutes and therefore, it is my opinion that the above stated question is properly answered in the affirmative.

JUSTICES OF THE PEACE COURTS

January 9, 1953.—053-6.

CONSTABLE'S AUTHORITY—SERVICE OF PROCESS

QUESTION: What are the powers and duties of a constable relating to the service of process?

To: *Honorable Leonard Tobin, Constable Elect, Miami Beach, Florida:*

Article VIII, §6 of the Florida Constitution, which creates the office of constable, confers upon the legislature the power to prescribe the powers and duties of such officer. Section 47.12, F. S. 1951, provides that all process, except that issuing from a Justice of the Peace Court, shall be served by the sheriff or any constable of the county in the district in which it is to be served. The process of a Justice of the Peace Court may be served by the sheriff or the constable.

Section 37.16, F. S. 1951, is quoted as follows:

The sheriff or any constable of the county shall be the executive officer of the courts of justice of the peace but if the sheriff or constable shall, for any reason, be disqualified or unable to act, the justice of the peace may appoint any individual, not interested in the case on trial, to serve process and to perform all duties of such executive officer. Any constable of the county in which the process issued may serve the process of the county judge's court and justice of the peace courts in any district of said county where the same may be lawfully served, provided he shall not be entitled to greater mileage in any case in serving writs from courts of justice of the peace than he would be if the writ issued from such court in the district in which such constable resides and for which he was elected.

In considering the latter statute, opinion 050-414, dated August 24, 1950, a copy of which is enclosed, construed §37.10, F. S. 1951, to authorize the constable of the county of which the process issued, to serve the process of both the County Judge's Court and the Justice of the Peace Courts in any district of the county where the process may be lawfully served.

Fountain v. Fountain, 123 Fla. 748, 167 So. 651 definitely determined that a constable is vested with authority to serve the civil process of the Court of Record of Escambia County, Florida within the Justice of the Peace district in which such constable is authorized to officiate.

To summarize: A constable may serve the process of courts other than Justice of the Peace or County Judge's Court *within the Justice of the Peace district for which he was elected*. The process of the Justice of the Peace Court of the constable's district and of the County Judge's Court may be served by the constable in any district of the county where the same may be lawfully served.

January 22, 1954.—054-13.

JUSTICES OF THE PEACE—VACANCY IN OFFICE
—METHOD OF FILLING

QUESTIONS: 1. When a justice of the peace resigns from his office during the first year of his term and a successor is appointed, is the successor entitled under Art. V, §33, F. Const., to the entire unexpired term which ends in January 1957?

2. What is the date before which a candidate for justice of the peace must qualify in order to have his name on the primary election ballot?

To: *Honorable E. W. Gautier, Senator, New Smyrna Beach, Volusia County, Florida:*

Article V, §33, Florida Const. is as follows: "When the office of any judge shall become vacant for any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy."

Article XVIII, §6, Florida Const. provides as follows: "The term of office for all appointees to fill vacancies in any of the elective offices under the Const. shall extend only to the first Tuesday after the first Monday in January next after the election and qualification of a successor."

In regard to your first question it is necessary to read these provisions of the Florida Const. in such a way as to give the fullest possible effect to both. Neither provision has been amended since the adoption of the Const. in such a way as to substantially affect the answering of the question.

In order for the two sections to be reconciled, §33, Art. V, must be construed as prohibiting the election or appointment of a judge for more than the unexpired term of the predecessor whose vacancy he was appointed or elected to fill. It must not be understood to mean that in every instance the term of an appointee to fill a vacated judgeship should be for no less than the remainder of the unexpired term. The adoption of the latter construction would bring §33, Art. V, into conflict with §6, Article XVIII.

Thus, it is concluded that a vacancy in an elective office of any judge, when it occurs prior to the general election which is held in the second year of the term, should be filled by an appointment for a term which shall extend only to the first Tues-

day after the first Monday in January following that general election. The person elected to take office at that time should be commissioned only for the unexpired term. (See opinion of the Justices, 68 Fla. 560, 66 So. 1003).

As to your second question, candidates for justice of the peace are candidates for county offices and should qualify with the clerk of the court prior to noon on March 15, as required by paragraph 3 of §99.061, F. S. Section 99.071 does not apply to a candidate for justice of the peace since a justice of the peace court is not created by a special act of the Legislature, but by the Constitution.

1. When an appointment is made to fill a vacancy in a justice of the peace office during the first year of the regular term of the office, the term of the appointee should run until the first Tuesday after the first Monday in January following the next general election. On that date the person who was elected to the office at the immediately preceding general election would take office for the remaining two years of the unexpired term.

2. Candidates for offices of justice of the peace which have to be filled at the next general election must qualify in accordance with §99.061, F. S., prior to noon on March 15, 1954.

July 20, 1953.—053-166.

**JUSTICES OF PEACE—COMPENSATION—
§28.24, F. S. APPLICABLE**

QUESTION: "Since Section 81.26(2), Florida Statutes, authorizes a justice of the peace to receive the same fees for similar services as are received by a clerk of the circuit court, is a justice of the peace authorized to charge the flat fee allowed circuit court clerks by Section 28.241, Florida Statutes?"

To: *Honorable Bryan Willis, State Auditor, TALLAHASSEE:*

According to §81.26(2), F. S., the fees allowed a justice of the peace are the same as those allowed a circuit court clerk for similar services. The services referred to are ministerial or clerical rather than judicial (*State ex rel. May vs. Fussell*, 157 Fla. 55; 24 So. 2d 804). The statute fixing the fees of justices of the peace should be strictly construed, (*Gavagan vs. Marshall*, 160 Fla. 154; 33 So. 2d 862), and should be read in *pari materia* with statutes fixing fees of county judges and circuit court clerks (*State ex rel. May vs. Fussell*, *supra*).

Sections 28.24 and 28.241, F. S., establish generally the compensation received by circuit court clerks for the services specified in the absence of a valid special, local or general law to the contrary. Section 28.24 is applicable in all instances where §28.241, or some other appropriate law is not applicable. The latter section authorizes a clerk to receive a certain specified flat fee for performing all the clerical services necessary in regard to certain types of cases. It should be observed that this flat fee is allowable for services performed in the circuit court or services

rendered in the appeal of a case to or from the circuit court and that §28.24 is not similarly limited in its applicability.

Thus, a circuit court clerk may charge different fees for performing the same services in different courts. The sum of the appropriate fees in §28.24 may be charged in a civil court of record, for example, and a single flat fee may be charged for corresponding services rendered in regard to the same kind of case instituted in the circuit court.

Since, as explained hereafter, the portions of Florida Statutes, 1953, pertaining to the compensation of circuit court clerks are incorporated by reference as a part of §81.26, F. S., and since there is an obvious ambiguity occasioned by such adoption, it is appropriate to rely upon the established rules of statutory construction in order to determine the legislative intent.

In construing a statute one must be guided by the legislative intent even though it may seem to contradict the strict letter of a statute, and a literal interpretation should not be made when it leads to an unreasonable conclusion or to a purpose not intended by the Legislature (*State vs. Wentworth*, 135 Fla. 565; 185 So. 357). When the meaning of a statute is clear, its consequences, if evil, can only be avoided by a change of the law itself. However, an interpretation of a statute that must lead to absurd consequences will not be permitted where the statute is susceptible of another interpretation by which such consequences can be avoided (*Curry vs. Lehman*, 55 Fla. 847; 47 So. 18; *Miami vs. Romfh*, 66 Fla. 280; 63 So. 440).

In *State ex rel. Murphy vs. Harlee*, 131 So. 866, the Supreme Court of Florida set down a principle which, when applied in the terms of the present law, is to the substantial effect that §81.26 incorporates by reference all provisions of the same enactment that pertain to the fees of a circuit court clerk. The fact that the origin of §28.241 was subsequent in point of time to that of §28.24 does not preclude the former from being adopted by §81.26 since all of these sections have been re-enacted as parts of Florida Statutes 1953. The result is that all sections of Florida Statutes pertaining to the fees of clerks of the Circuit Court become by reference a part of §81.26.

It can be seen upon examination of §81.26(2) that it contemplates a plurality of fees rather than a single fee. The section might be rephrased as follows: The fees allowed to the justice of the peace are the same as the fees allowed to a circuit court clerk for performing services similar to those authorized to be performed by a justice of the peace. Since the Supreme Court of Florida has ruled that this act must be strictly construed, it reasonably appears that a justice of the peace may receive the same compensation as a circuit court clerk only when his services are similar to those performed by the clerk and only when the clerk is compensated by separate fees for each service performed. It is not the intent of §81.26 that a justice of the peace should receive a single flat fee for performing the clerical and adminis-

trative duties of his office incident to a given case. It is intended, however, that he should receive separate fees for the several services performed, the amount of those fees to be determined by reference to the itemized list of the individual fees that a clerk may receive for performing each similar service.

This latter statement is substantially reinforced by the case of *State ex rel May vs. Fussell*, supra, where the Supreme Court pointed out that a justice of the peace was not entitled to receive a fee for attendance in his own court since such attendance was a judicial function and was not "similar" to the ministerial or clerical functions performed by the clerk. Since the flat fee allowed by §28.241 may be assumed to include compensation for a clerk's attendance in court, and since a justice of the peace, according to the above cited case, cannot receive a fee for attendance at his own court, the single flat fee would, if applied to a justice of the peace court proceeding, permit the justice of the peace to be compensated for a service not similar to the one performed by the clerk.

On the basis of these considerations it is my opinion that, as to the statutes referred to in the question, the compensation of the justice of the peace is governed by §28.24, F. S., and not by §28.241, F. S.

September 14, 1954.—054-221.

JUSTICES OF PEACE COURTS—EXPERT WITNESS FEES TAXED AS COSTS

QUESTION: What fees, taxed as costs, may be paid to an expert witness who testifies in a Court of the Justice of the Peace?

To: *Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:*

In order to answer the above question so that some definiteness may be ascertained, this opinion will be divided into two areas, (1) criminal cases and (2) civil cases before a Justice of the Peace.

(1) Criminal Cases:

Chapter 917, F.S., deals with the proceedings to determine the mental condition of a defendant, and under this chapter an expert witness may be called by the court to make the necessary examinations. Upon so doing, the state and defendant both may call experts of their own to examine and testify at the trial. Section 917.03, F.S., states:

"When expert witnesses are appointed by the court they shall be allowed such fees as the court in its discretion deems reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found or the information filed. Such fees shall be taxed as costs in the case."

This chapter, if read by itself simply allows the expert wit-

nesses, appointed by the Court, in determining mental conditions of defendants, to receive extra fees. However, §932.30, F.S., allows in all felony cases, that expert witnesses for the State or for an insolvent defendant, upon proper motion, may be appointed by the Court and the compensation, fixed by the Court, "shall be taxed as costs and paid in the same manner as other costs in said suit."

Therefore, it follows, from Ch. 917, and §932.30, F.S., that in all felony trials, whether determining the mental condition of a defendant or determining some other issue, all expert witnesses, appointed by the Court, are allowed special compensation which is fixed by the Court and taxed as costs.

There is no doubt that a Justice of the Peace may in some cases be a committing magistrate. However, these preliminary examinations, which are a necessary part of our criminal procedure, are actually not the "trial". Section 932.30, F.S., clearly states:

"When it shall be made to appear *in the trial* of any person in this state for a felony, that it is necessary... to have the testimony of an expert as to his opinion..."
(Emphasis supplied.)

It can be concluded from the above that only the trial court in felony prosecutions can appoint expert witnesses whose fees will be taxed as costs.

It is generally understood, in an absence of statute, an expert witness stands the same as any other witness and may be compelled to testify to whatever knowledge or opinions he may have concerning the matter at issue. Therefore, in a case where an expert witness may be needed to testify at a preliminary hearing to knowledge which he already has, the committing magistrate, if the fees are to be taxed as costs, can only allow fees which are fixed by statute.

Section 932.35, F.S., says:

"In criminal cases before justices of the peace, the pay of witnesses, when paid by the state, shall be for each day's actual attendance on the court..."

Section 932.36, F.S., allows:

"In case any person charged with any criminal offense is brought before a justice of the peace for examination or trial, and such person makes and files an affidavit that he is insolvent and unable to pay the costs of the defense or of procuring the attendance of his witnesses, and that certain witnesses, naming them and stating what he expects each to testify, are necessary to his defense, and that he cannot procure their attendance without subpoena, the justice shall if satisfied of the good faith and truth of such affidavit, issue and cause to be served a subpoena for such witnesses, not to exceed two to prove any one fact. The costs in such case, when audited and approved according to law, shall be paid by the county."

The witness fees in a Justice of the Peace court are one dollar per day and five cents a mile for the actual distance traveled to and from the court. (§90.14, F.S.)

By statute, in this state, the Justice of the Peace never has original jurisdiction to try a felony prosecution. His jurisdiction is limited in criminal proceedings to the extent of being a committing magistrate, conducting a preliminary examination and sometimes, depending on the location of his court, he may have original jurisdiction for certain misdemeanors. Therefore, in a case where he has original jurisdiction in the prosecution of a misdemeanor and some expert witnesses are needed by the state or an insolvent defendant to determine some issue other than the mental condition of the defendant, it is my opinion that the fees which are taxed as costs paid to these experts can only amount to those paid ordinary witnesses.

If the opinions of expert witnesses are needed during a preliminary examination or hearing, either for the state or an insolvent defendant and these opinions of the witnesses are based on knowledge they already have, again it is my opinion that the only fees which can be paid to them, taxed as costs, are the same as fees paid to ordinary witnesses.

However, if it should ever arise and the question of the mental condition of the defendant is at issue during the trial of a misdemeanor in a Justice of the Peace court which has proper jurisdiction, and that court calls in expert medical witnesses on its own motion or on motion by the state to examine the defendant and testify to their opinions based on the specific examination and general knowledge attributed to their profession, these witnesses shall be allowed such fees, taxed as costs, "as the court in its discretion deems reasonable, having regard to the services performed by the witnesses." (§917.03, F.S., supra.)

(2) Civil Cases:

The question in this area is answered by §90.231, F.S., which provides:

"(1) The term 'expert witness' as used herein shall apply to any witness who offers himself in the trial of any civil action as an expert witness, and who is permitted by the court to qualify and testify as such, upon any matter pending before the court."

"(2) Any expert witness who shall have testified in any cause shall be allowed a witness fee including the costs of any exhibits used by such witness in such reasonable amount as the trial judge may determine, not in excess of ten dollars per hour from time of reporting to place of the trial until conclusion of his testimony, and the same shall be taxed as costs: ..."

Therefore, it follows, that in all civil actions before a Justice of the Peace with proper jurisdiction, expert witnesses may receive reasonable fees, taxed as costs, as determined by the Justice of

the Peace, provided that the amount of the fees does not exceed the amount prescribed by §90.231, F.S., *supra*.

January 29, 1953.—053-17.

JUSTICE OF PEACE DISTRICTS—ABOLISHMENT
BY REFERENDUM

QUESTION: Should commissions be prepared and issued to persons elected as justices of the peace and constables in those counties which by referendum abolished all justice of peace districts at the 1952 general election?

To: *Honorable R. A. Gray, Secretary of State:*

Your request states that, by reason of the certified results of the referendum elections conducted under authority of Chapters 27380, 27393, 27592, 27622 and 27664, Laws of Florida, Acts of 1951, all justice of peace districts were abolished in the counties of Alachua, Bay, Highlands, Holmes and Lake.

Assuming that these acts and the referendums conducted in accordance with them were regular in all respects, it is my opinion that the offices of justice of peace and constable were abolished on the dates designated in the pertinent legislative acts for the abolishment of the districts, that there were therefore no offices in existence which could be filled by those elected justice of peace and constable in the affected counties at the 1952 general election, that commissions issued to those persons who were elected to offices which no longer exist have no legal effect, and that any fees paid to you by such persons for their commissions should be returned.

August 17, 1954.—054-202.

CONSTABLES—APPOINTMENT AS DEPUTY SHERIFF
—DUAL JOBS—XVI, 15, FLA. CONSTI.

QUESTION: Is it permissible for a Constable to hold the office or position of a deputy sheriff at the same time he is serving as Constable?

To: *Honorable M. C. Scofield, County Attorney, Inverness, Florida:*

There have been some court decisions and many opinions from this office on the subject of dual jobs and their permissibility under the Florida Consti., Art. XVI, §15 which states:

“...and no person shall hold, or perform the functions of more than one office under the government of this State at the same time...”

The Supreme Court has ruled on similar issues and in interpreting this constitutional provision has decided that a person may not hold two *state offices* when such offices require the performance of the duties of the sovereign powers of the State of Florida. A County official is considered a state official in so far as this constitutional provision is concerned.

Under §6, Art. VIII, Florida Consti., there can be no doubt that Constables and Sheriffs are elective county officials and therefore state officials. However, whether deputy sheriffs are state officers to be included under the interpretation of §15, Art. XVI, is a question upon which the court has not ruled directly. In *State v. Gandy*, 178 So. 166, 167, (Fla. 1937), the court said:

"A deputy sheriff is not and independent officer but acts for and in the name of the sheriff;..."

In the recent case of *Blackburn v. Brorein*, 70 So. 2d, 293, (Fla. 1954), the court, in ruling that the part of the Hillsborough County Civil Service Law (Ch. 27601, Laws of Florida, Special Acts of 1951) which relates to sheriffs and deputy sheriffs was unconstitutional, termed a deputy sheriff to be an officer and not an employee. In so ruling, the court cited *State V. Gandy*, supra, as part of their argument to term a deputy sheriff as an "officer." The court also referred to 47 Am. Jur. 929-931, *Deputies*, §154 which states:

"... Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or municipal officer within the meaning of constitutional provisions."

What the court's decision will be, when and if fronted with this problem, I can not say. Nevertheless, until an opinion is rendered by the Supreme Court, I feel that a deputy sheriff is not an independent officer of the state and that the limitations imposed by §15, Art. XVI, of the Florida Consti. do not fall upon him. This idea is in accord with former opinions from this office numbered 053-279, October 19, 1953 and 051-277, August 17, 1951, copies enclosed.

Presupposing that I am correct in the belief that a deputy sheriff is not an "independent state officer," and therefore there would be no constitutional objection to a Constable also being a deputy sheriff, there is a common law principle which should also be observed. No one person can hold two jobs which are or may be considered as being incompatible. In this case it would appear that a Constable and deputy sheriff, although having similar duties, may be incompatible in their respective positions. This same similarity may be the cause of the incompatibility because there would arise in many instances the question of "in what capacity did you serve?" This doubt would create a problem as to fees and who should be entitled to them.

This Question should be answered in the negative and in so doing I concur with the decision of my previous opinion numbered 049-116, 1949, appearing in the Biennial Report of the Attorney General, 1949-1950, at page 62, which was based on Opinion 045-76, March 22, 1945, appearing in the Biennial Report of the Attorney General 1945-1946, at page 121. Although I agree with the conclusion reached in the above cited opinions, I now disagree with the reasoning then used. These old decisions were based on the proposition that under §15, Art. XVI, a deputy

sheriff was a state officer to be controlled by that constitutional provision.

JUVENILE COURTS

November 13, 1953.—053-307.

JUVENILE COURTS—DRIVER'S LICENSE— VIOLATIONS—SUSPENSION

QUESTIONS: 1. Is the Department of Public Safety authorized to suspend a restricted driver's license issued to an infant over fourteen and under sixteen years old for a violation of one of the restrictions without bringing the infant before the Juvenile Court?

2. What authority does the Juvenile Court have over infants under seventeen years old holding a restricted driver's license when such infant violates the restriction of the license?

To: Honorable Harvey E. Page, Juvenile Judge, Escambia County, Pensacola, Florida:

As to Question One

Section 322.16, F. S., authorizes the issuance of operator's or chauffeur's licenses with appropriate restrictions. Subsection (3) of that section authorizes the Department of Public Safety to suspend or revoke such restricted licenses upon satisfactory evidence of violation of the restriction of such license, "but the licensee shall be entitled to a hearing as upon a suspension or revocation under this chapter." Subsection (4) of that section declares it a misdemeanor for the holder of a restricted license to operate a motor vehicle in any manner in violation of the restrictions.

Section 322.27, authorizes the Department of Public Safety to suspend a license without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee has committed certain acts therein enumerated. Subsection (2) provides for a hearing on demand of the licenses, etc. The section comprehends all licensees.

The answer to question one is that the Department of Public Safety is authorized to suspend the license of any licensee by §§322.16 and 322.27, without preliminary hearing.

I am cognizant of the last sentence of my opinion, 049-464, dated September 30, 1949, and of the first paragraph of my opinion, 052-315, dated November 17, 1952, copies of which are enclosed.

The statement "...in no case can the holder of a legal driver's license be deprived thereof, until he is convicted of an offense for the commission of which the statute imposes the penalty of suspension or revocation," occurring in the last sentence of A.G.O. No. 049-464, and quoted in A.G.O. No. 052-

315, was in reply to questions posed in requests for those opinions and should be restricted to similar situations.

As to Question Two

Section 39.02(1), F. S., confers upon the Juvenile Court original jurisdiction of dependent and delinquent children living or found within its territorial limits. Subsection (2) of that Section requires all proceedings against a child for alleged violation of law to be brought in the Juvenile Court, with certain exceptions not relevant here.

Since a violation of any of the restrictions of a restricted driver's license is by statute declared a misdemeanor, then any proceeding wherein the child is charged with the violation would necessarily be brought in the Juvenile Court.

It seems reasonable that §322.27 was intended to operate in, among others, the situation where there was evidence of violation, but pending adjudication on the charge, in order to protect the public from such drivers in the interim.

The foregoing discussion indicates that the answer to the second question is that any proceeding involving possible punishment for the misdemeanor shall be in the Juvenile Court.

Nothing herein is intended to detract from what I said in the concluding paragraph of my Opinion 052-315, supra, as follows:

"This conclusion does not mean, however, that a juvenile counselor should not cooperate with the department of public safety in initiating a revocation or suspension of the driver's license of a delinquent child in accordance with the procedure and provisions of Ch. 322, F. S.,..."

We do not construe administrative suspension of a driver's license as punitive.

July 7, 1954.—054-156.

MUNICIPAL COURT—JUVENILES—TRAFFIC VIOLATIONS

QUESTION: May juveniles be taken into Municipal Court and tried for traffic violations?

To: *Honorable Tom Nagle, Past President, Florida State Lodge, Fraternal Order of Police, Lake Worth, Florida:*

Chapter 39, F. S., dealing with Juvenile Courts, is decisive of the question in so far as concerns juveniles under the age of 17 years at the time of the commission of the traffic violation.

The word "child" is defined by §39.01(6) as any married or unmarried person under the age of 17 years, or any person who is charged with a violation of law occurring prior to the time that person reached the age of 17 years.

The definition of "delinquent child" found in §39.01(11) includes a child who commits a "violation of law".

Section 39.02(12) defines "violation of law" as the violation of any law of the United States, the State of Florida, or another state within the United States, or a city or town ordinance of a city or town within the United States.

Section 39.02(1) provides that the juvenile court shall have *exclusive original jurisdiction* of dependent and *delinquent children* domiciled, living or found within the county or district in which the court is established, and §39.02(2) provides that all proceedings against a child for alleged violation of law must be brought in the Juvenile Court, except as provided in §39.02(6).

Subsection 6 of §39.02 contains the following provisions:

"(6) If the judge deems that any child brought into juvenile court as a delinquent child, who is fourteen years of age or older, and who, if an adult, would be charged with a violation of Florida law constituting a felony, should be transferred to the court which would have jurisdiction of the child if the child was an adult, or if any child brought into juvenile court as a delinquent child, and who, if an adult, would be charged with a violation of the laws of Florida, so demands prior to or at the commencement of the hearing before the court, the judge shall enter an order waiving jurisdiction and certifying the case to the court which would have jurisdiction of the child if the child was an adult, and thereafter the child shall be subject to the jurisdiction of the other court as if the child were an adult; provided, that a child sixteen years of age or older who, if an adult, would be charged with a capital offense, shall be so transferred..."

These statutes considered, it is my opinion that a child under the age of 17 years who violates a traffic ordinance of a municipality is a delinquent child and that the Juvenile Court has exclusive original jurisdiction to handle such child. Even if the Juvenile Judge should wish to waive jurisdiction and transfer the child to the municipal court for trial on a traffic charge, and even if the child should request such transfer, I don't think that the juvenile judge would be authorized to do so because §39.02(6) makes no provision for such waiver and transfer in the case of a child charged with the violation of a municipal traffic ordinance, since such a charge does not involve a capital offense or other felony or a violation of any of the laws of the State of Florida.

Therefore, it is my opinion that the question propounded by you is properly answered in the negative in so far as concerns children under the age of 17 years at the time of the violation of the traffic ordinance. As to children 17 years old or above at the time of such violation, I know of no reason why they may not be tried in the municipal court, provided that notice of the charge be given prior to the trial to the parents or guardian, other relative, or friend, as required by §932.38, F. S.

SMALL CLAIMS COURTS

July 29, 1953.—053-175.

SMALL CLAIMS COURTS—JURY TRIALS—COMPENSATION OF JURORS—ORANGE COUNTY

QUESTION: Where demand for jury trial is made in the Small Claims Court of Orange County, under §42.16, F. S. 1951, through what procedure are the jurors obtained and what pay do they receive?

To: *Hon. Sylvan McElroy, Judge, Small Claims Court, Orange County, Orlando, Florida:*

We do not find any population act or special law which governs the selection of prospective jurors in Orange County. Hence, we base our conclusions upon the general statutes.

As indicated in the question, §42.16 provides that either party may, by following the provisions thereof, demand a jury trial.

In Opinion 052-340, copy of which is enclosed, we considered the question of obtaining of prospective jurors for jury duty in the Small Claims Court of Duval County, and the pay of such jurors. However, as will be noted from the opinion, that while the Small Claims Court of Duval County was established by Ch. 25489, Laws of Florida, 1949, neither the Duval County law nor the general law provides any method for selection of jurors.

Chapter 40, F. S. 1951, deals with jurors and jury lists. Trials in the courts designated in said chapter are usually jury trials. Consequently, the need for prospective jurors is present when such courts are trying cases. In other words, a normal function of these courts is the issuance of jury venires for trial of cases therein pending.

In trials before a Justice of the Peace as well as trials in the Small Claims Courts, jury trials are rare. Consequently, we feel that the jury should be procured in the same manner as in the Justice of the Peace Court, and contained in §81.08, F. S. 1951.

Since the enactment of Ch. 28427, Laws of Florida, 1953, the compensation of grand and petit jurors in all courts of the state, is five dollars per day and in addition, "...five cents per mile for every mile necessarily traveled in going to and returning from court by the nearest practical route."

October 27, 1953.—053-289.

SMALL CLAIMS COURTS JUDGE—ABSENCE OR SICKNESS—DISQUALIFICATION

QUESTION: Where, under Ch. 42, F. S. 1951, a judge of a small claims court is unable to act because of disqualification, absence, sickness or other cause, what course should be pursued by said judge?

To: *Honorable Raymond G. Nathan, Judge, Small Claims Court, Miami, Dade County, Florida:*

You refer to State ex rel David Bialeck, Inc. v. Ferguson, Justice of the Peace, 58 So. 2d 145. There the court held a general bill of local application (Ch. 26667, Laws of Florida, 1951) unconstitutional, which gave certain small claims courts jurisdiction not exceeding \$300.00, where the judges of said courts were also justices of the peace. The opinion was filed on April 15, 1942.

On the same day, In re Advisory Opinion to the Governor, 58 So. 2d 319, was filed. The first question asked by the Governor was:

"1. Is the provision for substitution of judges in small claims courts, found in §9 of Ch. 26920, laws of Florida, acts of 1951; applicable to small claims courts created by special or local laws so that no action on my part is necessary in order for the law to be faithfully executed?"

The court at page 322 advised in part:

"Section 9 of the Act provides:

"Whenever the judge of the small claims court shall be unable, from absence, sickness, or other cause, to discharge any duty whatever appertaining to his office, he may by order call in one of the justices of the peace to act in his place and stead, and such justice shall perform such duties and hear and determine all such matters as may be submitted to the judge of the small claims court."

"This section applies to a judge under that act and not to judges under local or special acts."
Section 9 quoted above is now §42.09, F. S. 1951.

By §42.03, F. S., 1951, a small claims court has jurisdiction not exceeding \$250.00.

While this office does not undertake to pass upon the constitutionality of any statute, we cannot in view of the Ferguson case, supra, avoid concern over the serious question of the constitutionality of §42.09, F. S., 1951, where an attempt is made to confer upon a justice of the peace, more jurisdiction than given by Art. V., Sec. 22 of the Florida Constitution, that is, \$250.00, as against the Constitutional \$100.00.

In the advisory opinion reported in 58 So. 2d 319, the court said in response to question 2, that under local or special acts "...where the presiding judge is disqualified or unable to act in a particular case or cases and the act creating such court contains no provision for substitution or designation of judges, Section 38.09 applies..." The later expression of the court, In re Advisory Opinion to the Governor, 63 So. 2d 274, pertaining to substitution of judges of small claims courts, adds nothing to the earlier opinion.

In the event §42.09, F. S. 1951, should be unconstitutional, then there would be no provision under Ch. 42 for substitution of a judge, and the situation seemingly would be governed by §38.09, F. S., 1953. Said section contains the language:

"Every judge of this state shall upon the entry of an order of *disqualification* mail a copy of said order to the governor." (Emphasis supplied)

The Supreme Court in advisory opinion to the Governor, 58 So. 2d 319, when determining that the general statute was applicable to that situation used the language "...is disqualified or unable to act in a particular case or cases . . .", thereby indicating that Section 38.09 may be applicable to a situation where the judge is disqualified or for any other reason unable to act. This is a reasonable deduction even though said Section 38.09 refers only to "disqualification".

By reason of the above I feel your question is properly answered as follows:

Where you are disqualified; will be absent from your duties for a considerable period of time by reason of sickness or other cause, you should follow the provisions of §38.09, F. S., 1953. In the event the Governor then has doubt as to the proper course for him to pursue, he may request a clarification from the Supreme Court, by way of an advisory opinion.

CHAPTER VI

CIVIL PRACTICE AND PROCEDURE

COMMENCEMENT OF SUITS AT LAW AND PROCESS

July 12, 1954.—054-165.

SEARCH WARRANTS—SERVICE ON SUNDAY— §47.46, F. S. APPLIES

QUESTION: May a search warrant lawfully be served on Sunday?

To: *Honorable Joe Carr, Supervisor, State Beverage Department, Tampa, Florida:*

The answer to this question is found in §47.46, F. S., which reads as follows:

"47.46 *Service of process, etc., on Sunday.* Service or execution upon Sunday, of any writ, process or warrant, order, judgment or decree, shall be void to all intents and purposes whatever; and the person so serving or executing, or causing to be served or executed, the same shall be liable to the suit of the party aggrieved, and to answer damages to him for so doing, as if he had done the same without any process, writ, warrant, order, judgment or decree; however, if information shall be made by the oaths of two respectable persons to any judge or justice of the peace or magistrate of any corporate town, that they have good reason to believe that any person liable to have any such process, warrant, order, judgment or decree served upon him intends to withdraw himself, and escape from this state under cover of protection of Sunday, any officer duly authorized may, being furnished with a certificate of such information upon oath as aforesaid, under the hand of the judge, justice of the peace or magistrate as aforesaid, serve or execute such process, warrant, order, judgment or decree, on Sunday, which shall be as valid and effectually done, to all legal intents and purposes, as if the same had been done on any other day of the week."

It appears from said statute that the service or execution upon Sunday of any writ, process or warrant is void to all intents and purposes whatever except when done strictly in accordance with said statute. A search warrant is a writ, process or warrant. Therefore, said §47.46 applies to search warrants and is a complete statement of the law on the question.

What is said herein is in accordance with an opinion rendered by Honorable Fred H. Davis, former Attorney General, on May 8, 1930 (Attorney General's Biennial Report for 1929-1930, page 385) and with an opinion rendered by former Attorney General Cary D. Landis on September 11, 1931 (Attorney General's Biennial Report, 1931-1932, page 820).

TRIAL PRACTICE AND PROCEDURE

February 11, 1953.—053-33.

SMALL CLAIMS COURTS—CHALLENGES—JURY TRIAL

QUESTIONS: 1. Are the party litigants in a small claims court action entitled to peremptory challenges as provided for in §54.11, F. S., 1951?

2. Are party litigants in a small claims court action entitled to the challenges for cause as provided for in §54.12, F. S., 1951?

To: Honorable G. E. Bryant, Jr., Judge, Small Claims Court, Okeechobee, Florida:

The obvious purpose of the legislature in providing jury trial in a small claims court action as provided in §42.16 was to guarantee to the parties in such action their constitutional right of a jury trial under §3 of the Declaration of Rights of the Florida Constitution. The intent of the legislature as expressed in §§54.11 and 54.12, providing for peremptory and challenges for cause is to secure to parties demanding a jury trial, the right to select qualified persons for jury service who are able to render a fair and just verdict.

In order to determine whether these two statutes are applicable to party litigants in a small claims court action, reference must be made to the language contained in these statutes. The intention of the legislature in any instance must be primarily ascertained from the language used in the statute itself from the words, phrases and sentences which make up the statute subject to construction. Statutory Construction, Interpretation of Law, Crawford, §164. Section 54.11 provides that on the trial of any civil cause in any court, each party litigant shall be entitled the number of peremptory challenges set forth in the statute. When this provision is construed in view of the provision contained in §42.03, granting civil jurisdiction in cases at law, in which the demand or value of the property involved does not exceed \$200.00, it is my opinion that §54.11 from the language expressed therein, would extend to a small claims court action.

Section 54.12 provides that the judge of any justice of the peace court, county judge's court, county court, civil court of record, circuit court, or any other courts wherein a trial by jury is had, the parties may have the challenges for cause as provided therein. Although §54.12 does not specifically enumerate that it will be applicable to small claims court actions but from the language used in the statute providing "or any other court wherein trial by jury is had," would be sufficiently broad enough to extend in my opinion to include a small claims court action.

JUDGMENTS AND EXECUTIONS

May 21, 1953.—053-106.

JUDGMENTS—PROPERTY LIENS—RECORDING OF
CERTIFIED TRANSCRIPT REQUIRED—§55.10, F. S.

QUESTION: Will the recording of the original judgment or decree, instead of a certified transcript thereof, in the judgment lien record comply with the requirements of §55.10, Florida Statutes, so as to make the said judgment or decree a lien upon the real property of the defendant in the county?

To: Honorable H. T. Piety, Clerk of the Circuit Court, Sebring, Florida:

An examination of §§55.08, 55.09 and 55.10, F. S., and of like and similar prior statutes and laws, shows a different requirement, as to judgments and decrees rendered prior to and those rendered after June 5, 1939. The said June 5, 1939, was the effective date of Ch. 19270, Laws of Florida, Acts of 1939, §1 of which became subsection (11) of §28.21 and §2 of which became §55.10, F. S. When said Ch. 19270 is compared with Ch. 10166, 14749 and 17998, Laws of Florida, Acts of 1925, 1931 and 1937, and Title 28, § 1962, (formerly Title 28, §§812 and 814) of the United States Code, we gain the impression that the Legislature was trying to comply with the said Federal statute so as to require the record of Federal judgments and decrees in the county where the lands lie before said judgments and decrees became a lien upon the said lands.

Under said §1962, Title 28, of the United States Code, "every judgment rendered by a district court within a state shall be a lien on the property located in such state in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such state, and shall cease to be a lien in the same manner and time. Whenever the law of any state required a judgment of a state court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such state authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the state." The circuit courts of this state are courts of general jurisdiction.

Section 55.10, F. S. provides that "no judgment or decree hereafter rendered by the circuit courts or any other courts of this state shall become a lien on real estate until a *certified transcript of said judgment or decree* is recorded in the judgment lien record as provided by Section 28.21, subsection (11) of these statutes..." The judgment lien record is maintained in the clerk's office, under subsection (11) Section 28.21, Florida Statutes, for the purpose of recording "certified transcripts of judgments and decrees of the circuit courts and all other courts of this state, and judgments and decrees of the United States district courts..."

If the entry of a judgment or decree of a circuit court in the Minute Book or Chancery Order Book makes that judgment or decree a lien against the property of the defendant within the county it would seem that under the above mentioned Federal statute that the entry of a Federal judgment or decree in the proper record of the district court would likewise make that judgment a lien upon the lands of the defendant in the division or may be the district and this without any recording of the same in the county. A like rule must be applicable to both the judgments and decrees of the state courts and the federal courts. This uniformity of operation was probably not accomplished until the enactment of Ch. 19270, Laws of Florida, Acts of 1939, now appearing as §28.21, subsection (11), and §55.10, F. S.

In the light of the above observations and *Mitchell v. Beisenherz*, 192 Ind. 587, 135 N. E. 885, *Hastings School District v. Caldwell*, 16 Neb. 68, 19 N. W. 635 and *Louisville and Nashville Railroad Company v. Caudill*, 302 Ky. 255, 194 S. W. 2d. 508 (defining the term "transcript") and *Nassau Realty Company v. City of Jacksonville*, 144 Fla. 754, 198 So. 581, we feel that in order to comply with the provisions of §55.10, F. S., that a certified transcript, and not the original, judgment or decree should be recorded otherwise it is doubted that the lien contemplated by the said statutes arises. The question above stated is answered in the negative.

COURT COSTS

August 6, 1953.—053-189.

JUDGMENT AND SENTENCE—APPEALS AS SUPERSEDEAS—COURT COSTS

QUESTIONS: 1. "When an appeal is filed in this court after the defendant has been found guilty, adjudged and sentenced; and where no proceedings have been started or consummated in regard to insolvency; must the defendant, or his attorney pay the costs (for the arrest of the defendant, etc.) before the proper certified papers are prepared by the clerk and forwarded to the higher court?"

"Or, does the supersedeas bond posted guarantee the payment of these costs in cases where the judgment of this court is affirmed by the higher court?"

"If these costs must be paid by the defendant before docketing the appeal and forwarding the certified copies; would the sentence imposed by the court have any bearing on whether the said costs were paid or not? For instance, if the sentence was \$150 or 90 days, should it be \$150 and costs or 90 days to warrant the payment of the said costs?"

To: *Hon. Robert J. Haslett, Clerk, Criminal Court of Record, Bartow, Florida:*

Section 920.02(4) provides as follows:

"(4) In no case, whether capital or not, shall an appeal be supersedeas to the execution of the judgment, sentence, or order complained of, except upon payment by the appellant of all costs which have accrued in the case up to that time, and upon his entering into bond with two or more sufficient sureties according to law, in a sum sufficient to secure the payment of such judgment, fine and future costs as may be adjudged and affirmed in the appellate court, and conditioned that the appellant shall be personally forthcoming to answer and abide the final order, sentence or judgment which may be passed in the premises by the appellate court, and in case the cause is remanded, that the appellant shall personally be and appear at the next term of the court in which the case was originally determined, thereafter to be held to answer in the premises and not to depart from the court without leave thereof. . . ."

Said statutory provision requires that in order for an appeal to be a supersedeas the appellant must pay all costs which have accrued in the case up to that time and must make a bond to cover, among other things, the payment of "such . . . future costs" as may be adjudged and affirmed in the appellate court. However, I find no law which would require the defendant to pay accrued costs unless he wishes his appeal to be a supersedeas. Unless he is adjudged insolvent, he must, of course, pay the cost of preparing the appeal record and must pay the other appeal costs.

Next, as to what costs must be paid by the defendant as a prerequisite to having his appeal operate as a supersedeas. In the case of *MacNeill v. Marks*, 61 So. 2d 648, the Supreme Court of Florida construed §59.09, F. S., reading as follows:

"'No appeal may be taken by the original plaintiff in any suit or proceeding until he shall pay all costs which have accrued, in or about the suit, up to the time the appeal is taken.'"

and held that said statute does not require the payment of accrued costs by an appealing plaintiff until they are assessed against him in the judgment appealed from. The language of §59.09, F. S. is very similar to that provision of §920.02(4) which requires the payment of accrued costs in order to obtain a supersedeas and I think that the latter provision should be given the same construction as was given to the former in *MacNeill v. Marks*. Therefore, I do not think that an appealing defendant must pay any costs as a condition to having his appeal operate as a supersedeas unless he is required by the sentence to pay costs. For example, if the sentence should be that the defendant pay a fine of \$150 and in default thereof serve 90 days in the county jail, I do not think that he would have to pay any costs in order to supersede the judgment and sentence but if he should be sentenced to pay a fine of \$150 and costs of prosecution and in default thereof to serve 90 days in the county jail, he would be required to pay the costs in order to have his appeal operate as a supersedeas.

GENERAL CHANCERY JURISDICTION AND PROCEDURE

January 7, 1953.—053-3.

NE EXEAT BONDS—APPROVAL

QUESTION: Upon which officer rests the responsibility of approving ne exeat bonds?

To: Honorable Charles H. Pent, Clerk Circuit Court, Tampa, Florida:

Although the issuance of ne exeat is regulated to some extent by §§62.18 et seq., F. S., §62.19 of which provides that such bonds shall be required with "two good and sufficient sureties to be approved by the court," there is no statute declaring that any particular officer of the court must approve such bonds. We feel that an approval by either the judge, clerk or executive officer of the court would be a compliance with the statute. When the writ is issued we do not doubt that it is within the power of the judge to require the approval of the bond by himself, the clerk or the sheriff and that an approval by the officer designated would be a compliance with the terms of the statute. There would seem to be no question as to who should approve the bond when the person to approve is fixed by the order; the person designated in the order should approve the same. The problem arises when the order fails to designate the approving officer.

The writ of ne exeat is essentially a command to the sheriff to cause the defendant to give bail according to its terms or in default thereof to arrest the defendant and commit him to prison until he complies with the requirements of the writ (65 C.J.S. 283, §11; 38 Am. Jur. 628, §29; 20 Standard Enc. of Procedure 295 and 296; 13 Hughes Federal Practice 519, form 11276; 12 Enc. of Forms 1058-60, forms 14333-14336; 3 Daniel Ch. Practice, 6th Am. Ed., 2328). We have examined the form of ne exeat writ used in *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678, and those set out in 12 Enc. of Forms 1058-60, and find that substantially all of such forms command that the sheriff "without delay cause the said

personally to come before you and give sufficient bail or security in the sum of _____ dollars" and that on failure to give such bond that he be committed to jail until he complies with the said order of ne exeat. For the sheriff to comply with the commands of the writ without taking the defendant into custody it would appear necessary that he approve the bail or bond required. Ne exeat bonds in this state partake of the nature of penal bonds (*State v. Brown*, 105 Fla. 631, 142 So. 247). In the case of *Ex Parte Hatcher*, 86 Fla. 307, 98 So. 72, the court held that a person arrested in Leon County, Florida, on a warrant issued in Manatee County, Florida, was entitled to bail although the magistrate issuing the warrant failed to endorse thereon any amount of bail; the law entitled the prisoner to bail and he could not legally be returned to Manatee County merely because there was no amount of bail endorsed on the warrant. Bail was fixed in this case in a habeas corpus proceeding. As the usual form of the ne exeat writ is for the sheriff to cause the defendant

to make bail or to imprison him we see no reason why the sheriff may not take and approve the bond required unless the court has directed that it be approved by another. Criminal bail bonds may be approved by the sheriff.

We are, therefore, of the opinion that where a writ of ne exeat directs the officer by whom it should be approved that approval should be by that officer; however, when the writ is issued in the usual form, without any direction as to who may approve it, we think that the same may and should be approved by the sheriff or other person serving it. Where it is approved by the person serving it there would appear to be no need for the defendant to be taken into custody should he elect to make bond. This would seem to accord with the right of freedom protected by the state constitution. Should a bond be approved by the judge or clerk of the court, when the writ fails to designate the approving officer, it would be valid although it might also have been approved by the sheriff or other officer serving the writ.

STATUTORY LIENS

November 29, 1954.—054-253.

HOTEL AND APARTMENT HOUSE OWNERS—UNDESIRABLE GUESTS AND TENANTS—EJECTION—LIABILITY

QUESTIONS: 1. Does the owner or operator of a hotel or apartment house have the right to pad-lock the door of a tenant who is delinquent in rent and thereby prevent the tenant from entering his room or apartment?

2. Can the owner or operator of a hotel or apartment house be criminally liable for locking a delinquent tenant out of his apartment and thereby preventing him from recovering some or all of his personal property?

To: *Honorable Ray E. Ulmer, Justice of Peace, Clearwater, Florida:*

The answer to the first question may be found in §85.18, F.S., which authorizes a lien in favor of hotel and apartment house keepers upon chattels of guest or tenant who fails to pay for his lodging, and which also authorizes the ejection of such guests or tenants.

The method of ejection is discretionary, and, so long as it is reasonable, is authorized. Where an owner or operator of a hotel or apartment house locks a tenant out of his room or apartment for the tenant's failure to comply with the establishment's rules or regulations for rental payments, it would appear that this type of ejection is reasonable. *See Kloeppe v. Bradford*, 182 So. 839 (Fla. 1938).

From the aforesaid, the answer to your first question is in the affirmative.

The answer to the second question has partially been discussed in answering question number one. Section 85.18, *supra*, permits

a hotel or apartment house owner or manager to pad-lock a tenant from his room or apartment for the tenant's failure to pay rent past due. This, by statute, constitutes a lien "upon the goods and chattels belonging to such guests or tenants."

Section 85.19, F.S., clarifies this situation even more and points out that all personal property within the locked room or apartment of any delinquent guest or tenant is subject to this statutory lien.

The question of whether §510.08, F.S. can be construed to include non-paying guests as undesirables is not discussed in this opinion because it has no bearing on the instant problem, for when a room or apartment is pad-locked the guest is ousted by that act alone.

If the owner or manager of the hotel or apartment house was duly owed for rentals past due, he was justified in locking the tenant from his room or apartment, and he thereby established a lawful lien on the property found within the room or apartment. The second question must, therefore, be answered in the negative.

UNIFORM SUPPORT OF DEPENDENTS

February 19, 1954.—054-42.

UNIFORM SUPPORT OF DEPENDENTS LAW— ENFORCEMENT—COURT COSTS—LIABILITY

QUESTIONS: 1. In an action under the uniform support of dependents law, who pays the expense of filing the petition, issuing and serving the summons, taking testimony by a court reporter, etc?

2. Whose duty is it to file the petition in the first place?

3. Is the state attorney to be paid for his services as the petitioner's representative?

4. Can a circuit court of Florida, acting as a responding court, collect costs from the defendant?

To: *Honorable A. P. Buie, State Attorney, Ocala, Florida:*

As to Question One

On July 17, 1953, in my opinion No. 053-162, I expressed the following views:

"The Uniform Support of Dependents Law, being Ch. 27996, Acts of 1953, contains no provision for the payment of the clerk's fees or the sheriff's fees by the county or out of any public funds. Nor does it contain any provision for filing proceedings thereunder without the payment of these fees by anyone. Therefore, it is my opinion that the petitioner must pay said fees except that insolvent and poverty stricken petitioners will not be required to pay the same in counties having

a population of 180,000 or over if \$58.09, F. S. is complied with."

On December 22, 1953, in my opinion No. 053-334, I expressed the opinion that the Clerk's fees in cases brought under the Uniform Support of Dependents Law must be paid by the party or parties instituting the proceeding.

I still adhere to the views expressed in those opinions and I think that all expenses connected with the proceeding must be paid by the party or parties instituting the same except in instances where insolvent persons are relieved from payment of costs under \$58.09, F. S., in counties having a population of 180,000 or more.

As to Question Two

If a petition for support is brought in another state against a respondent who resides or is domiciled in Florida, §7(3) of Ch. 27996 requires that the judge of the court of the initiating state transmit an exemplified copy of the petition (and other prescribed documents) "to the appropriate court in the responding state" viz., to the circuit court of the Florida county in which the respondent resides or is domiciled.

I think that it would be an adequate compliance with this statutory provision if such exemplified copy of petition (and other prescribed papers) are sent to the Circuit Judge or to the Clerk of the Circuit Court.

Also, since §8 of Ch. 27996 makes it the duty of the state attorney in every judicial circuit of Florida to enforce the provisions of the Uniform Support of Dependents Law and to represent the petitioner in all proceedings instituted thereunder unless the petitioner should engage a private attorney, and since §9 makes it the duty of the petitioners' representative (the state attorney unless a private attorney is engaged) to appear in this state on behalf of and represent the petitioner in every proceeding pursuant to said law, at the time the petition is filed and at all stages of the proceeding thereafter, I think that it would be in good order for the judge of the court of the initiating state to send the exemplified copy of the petition (and other required documents) directly to the state attorney. In such case, I think that it would be the state attorney's duty to file the petition upon being furnished the necessary court costs.

As to an action instituted in this state, it appears that it would be equally appropriate for the petitioner in person to file the petition or for the petitioner's representative (the state attorney when no private attorney is employed) to file the same.

As to Question Three

Section 7(11) of Ch. 27996 provides that if the court finds that the prayer of the petitioner or any part thereof is supported by the evidence and that the petitioner is in need of and entitled to support from the respondent, the court shall make and enter an order directing the respondent to furnish support to the peti-

tioner and to pay therefor such sums as the court shall determine "and in addition thereto shall include in said order directions for the payment by the respondent of reasonable attorneys fees incurred by petitioner in such proceedings."

It is only when the petitioner engages a private lawyer to represent her as permitted by §§3 (7) and 8 of Ch. 27996 that an attorney's fee is incurred by the petitioner. No attorney's fee is incurred by the petitioner when the state attorney represents her as required by §§8 and 9 of said law, both of which Sections contemplate that the state attorney shall serve in this capacity without compensation, as a part of his official duties. Therefore, your QUESTION No. 3 must be answered in the negative.

As to Question Four

In my opinion No. 053-334, rendered on December 22, 1953, I stated, "Of course, the court before which the petition is pending may require payment of the costs by the respondent". Also in my opinion No. 053-162, rendered on July 17, 1953, I said, "However, I think the Act is sufficiently broad to authorize the court to require the respondent to reimburse the petitioner for outlays for such fees (referring to sheriffs' fees and clerks' fees) or other costs by appropriate order." I still adhere to the views thus expressed in said opinions, both of which dealt with actions under the Uniform Support of Dependents Law. Therefore, your Question No. 4 is answered in the affirmative.

I note your request for a list of the states which have adopted a law substantially similar to ours. My information is that all of the states except Mississippi and Nevada have adopted either the Uniform Support of Dependents Law or the Uniform Reciprocal Enforcement of Support Law. It is commonly accepted that these two laws are substantially similar and that actions for support brought in a state which has one type of law may be forwarded to a state which has the other type and there handled just as though both states had the same type of law. (However, in Pennsylvania this very question is in litigation at the present time.)

June 24, 1953.—053-131.

UNIFORM SUPPORT OF DEPENDENTS LAW— COPY ATTACHED TO PETITION FOR SUPPORT— §12, Ch. 27996, ACTS 1953

QUESTION: When a petition for support is filed in Florida under the newly enacted Uniform Support of Dependents Law (Ch. 27996, Acts of 1953), is it necessary that a copy of said law be attached to such petition as a part thereof?

To: Honorable Gene Williams, Assistant State Attorney, Miami, Florida:

As you pointed out in your letter, §12 of Ch. 27996, known as the Uniform Support of Dependents Law, says that "It shall

be sufficient to file the petition in substantially the following form:" and then sets out a form of petition which states that a copy of the law is attached to and made a part of the petition.

The intent of said §12 appears to be that a copy of the law should be attached to the petition, as a part thereof, for the ready inspection of the respondent and of the judge before whom the case is brought, and therefore I suggest that this practice should be followed.

June 10, 1954.—054-142.

STATE ATTORNEYS—DUTY—ENFORCEMENT—
UNIFORM SUPPORT OF DEPENDENTS LAW

QUESTION: Does the Uniform Support of Dependents Law, being Ch. 88, F. S., impose the duty upon the state attorney to represent dependents who are residents of Florida when the respondents are also residents of Florida?

To: *Honorable Phil O'Connell, State Attorney, West Palm Beach, Florida.*

Section 88.02 F. S., setting out the purpose of the Uniform Support of Dependents Law, says:

"The purpose of this uniform law is to secure support in civil proceedings for dependent wives and children from persons legally responsible for their support."

Section 88.06, prescribing the cases in which proceedings are maintainable under the Uniform Support of Dependents Law, says:

"A proceeding to compel support of a dependent may be maintained under this chapter in any of the following cases:

"(1) Where the petitioner and the respondent are residents of or domiciled or found in the same state..."

Section 88.08 and 88.09 provide as follows:

"88.08 Enforcement.—It shall be the duty of the state attorney in each and every judicial circuit of the State of Florida to enforce the provisions of this act, and to represent the petitioner in all proceedings instituted hereunder, unless the petitioner shall engage a private attorney.

"88.09 Duty of petitioners' representatives.—It shall be the duty of all petitioners' representatives of this state to appear in this state on behalf of and represent the petitioner in every proceeding pursuant to this act, at the time the petition is filed and at all stages of the proceeding thereafter, and to obtain and present such evidence or proof as may be required by the court in the initiating state or the responding state."

The foregoing statutory provisions considered, it is my opinion that your question should be answered in the affirmative except, of course, that the state attorney has no duty in the premises when the petitioner has a private attorney.

As I read said statutes, they show that the Legislature exhibited just as much solicitude for the welfare of Florida dependents as for the welfare of non-resident dependents, and they evidence the same intent to provide legal aid, that of the state attorney, for the one as for the other when the persons upon whom they depend for support reside in Florida.

I note the comment in your letter that "In Section 5 (§88.05 F. S.) it does not appear that the Court has jurisdiction of the parties if both reside in Florida in the enforcement of this particular act." I find nothing in this section that would cast doubt upon the proposition that the Uniform Support of Dependents Law was intended to cover support actions brought by residents of Florida against residents of Florida. On the contrary, Subsection 1 of said §88.05 specifically provides that "The court shall have jurisdiction regardless of the state of last residence or domicile of the petitioner and the respondent..."

I also note the comment in your letter that "In Section 7 under the procedure in Paragraph (2) it provides that if existing laws are in effect then such laws shall govern and control the procedure to be followed in such cases and Florida already has a law to enforce such payment of sums of money for both parties when they are residents of Florida..."

Section 88.07 (§7 of the Uniform Support of Dependents Law) refers exclusively to the "procedure" to be followed in actions brought under said law. It sets out in detail the *procedure* to be followed in case the petitioner lives in one state and the respondent lives in another state. Then, in Subsection 2, dealing with cases in which both parties reside in Florida and in which jurisdiction of the person of the respondent can be obtained under existing laws, it prescribes that in such cases "existing laws in effect in such state... shall govern and control the *procedure* to be followed in such proceeding."

Thus it is that, although one procedure is prescribed for cases in which the petitioner and the respondent both reside in Florida, and another procedure is prescribed to govern cases in which they reside in different states, nevertheless, the clear mandate of §§88.02 and 88.06 is that support actions are maintainable under the Uniform Support of Dependents Law in both classes of cases and therefore §§88.08 and 88.09 require that the state attorney shall represent the petitioner who is without a private attorney in both classes of cases.

Therefore, as above indicated, your question is answered in the affirmative.

July 17, 1953.—053-162.

SHERIFF AND CLERK—FEES—PAYMENT UNDER UNIFORM SUPPORT OF DEPENDENTS LAW

QUESTION: Who must pay the clerk's fees and the sheriff's fees in cases instituted under the Uniform Support of Dependents Law?

To: *Honorable Phil O'Connell, State Attorney, West Palm Beach, Florida:*

The Uniform Support of Dependents Law, being Ch. 27996, Acts of 1953, contains no provision for the payment of the clerk's fees or the sheriff's fees by the county or out of any public funds. Nor does it contain any provision for filing proceedings thereunder without the payment of these fees by anyone. Therefore, it is my opinion that the petitioner must pay said fees except that insolvent and poverty stricken petitioners will not be required to pay the same in counties having a population of 180,000 or over if §58.09, F. S., is complied with. However, I think the Act is sufficiently broad to authorize the court to require the respondent to reimburse the petitioner for outlays for such fees or other costs by appropriate order.

July 17, 1953.—053-163.

UNIFORM SUPPORT OF DEPENDENTS LAW—COUNTY
JUDGES' COURTS—JURISDICTION—CH. 27996,
F. S. APPLICABLE

QUESTION: Do the County Judges' Courts of Florida have jurisdiction over any proceeding under Ch. 27996, Acts of 1953, known as the Uniform Support of Dependents Law?

To: *Honorable Robert H. Wingfield, County Judge, DeLand, Volusia County, Florida:*

Chapter 27996 defines "Court" as follows:

"'Court' shall mean the Circuit Courts of the State, and include a family court, domestic relations court, children's court, municipal court and any other court by whatever name known in any state having reciprocal law or laws substantially similar to this act upon which jurisdiction has been conferred to determine the liability of persons for the support of dependents within and without such state."

When Ch. 27996 is construed in the light of this definition, I think that it means that only Circuit Courts in Florida are to have jurisdiction of proceedings under said Chapter.

The words in the above quoted definition which are not underscored refer to courts of other states having reciprocal laws substantially similar to our Ch. 27996 and do not apply to Florida courts.

Therefore, in my opinion, the County Judges' Courts of Florida have no jurisdiction to entertain any proceedings under said law.

July 8, 1953.—053-145.

UNIFORM SUPPORT OF DEPENDENTS LAW—INDIGENT
PERSONS—COURT COSTS—LIABILITY—DADE COUNTY

QUESTION: Who must pay the costs, filing fees, etc., in

cases instituted and prosecuted under Ch. 27996, Acts of 1953, known as the Uniform Support of Dependents Law?

To: Honorable Park H. Campbell, County Attorney, Miami, Florida:

Since you are the County Attorney of Dade County, I assume that you are interested in whether Dade County is liable for the payment of costs in proceedings under Ch. 27996, known as the Uniform Support of Dependents Law.

Chapter 27996 does not provide that the filing fees and costs in cases instituted thereunder shall be paid out of county funds or other public funds.

However, I call your attention to §58.09, F. S., which provides that in counties having a population of 180,000 or more (which includes Dade, Duval and Hillsborough Counties) insolvent, poverty stricken persons having actionable claims or demands existing in their favor, shall be entitled to receive the services of the courts, sheriffs, clerks and constables of said counties without charge or cost; that no prepayment of costs shall be required in such counties when the party entering the suit makes and files the affidavit of insolvency required by said statute, accompanied by the required certificate of counsel; and that every sheriff or constable who, in complying with said statute, expends his own personal funds for automotive fuel or ordinary car fare in serving the process of those qualifying under the statute may requisition the board of county commissioners for the actual outlay of expense involved.

In my opinion, said §58.09 applies to the following actions in Dade County (as well as in Duval and Hillsborough Counties) under our Uniform Support of Dependents Law, to-wit:

(1) Actions against respondents residing or domiciled in said counties.

(2) Actions commenced in said counties against respondents residing in other states having reciprocal laws substantially similar to our Uniform Support of Dependents Law.

(3) Actions commenced in other states having reciprocal laws substantially similar to our Uniform Support of Dependents Law, against respondents residing or domiciled in said counties of Dade, Duval and Hillsborough, and certified to said counties.

December 22, 1953.—053-334.

CLERK CIRCUIT COURT—FEES—UNIFORM SUPPORT OF DEPENDENTS LAW

QUESTION: Where a petition is filed pursuant to Ch. 27996, Laws of Florida, 1953, how is the clerk's filing fee to be paid?

To: Honorable Charles A. Darby, Clerk Circuit Court, Starke, Bradford County, Florida:

Chapter 27996, designated the "Uniform Support of Dependents Law" is, as its title suggests, a uniform civil proceed-

ing to force support of dependent wives and children, both within and without the State of Florida. The act is silent as to what fee or fees may be charged by the clerk and how they are to be paid. Since you did not direct our attention to any special or local act applicable to Bradford County, we assume your fees are those provided by §28.241, F. S., which in part provides:

"Upon the institution of any civil action, suit or proceeding in the circuit court of any county in the State of Florida there shall be paid by the party or parties so instituting such action, suit or proceeding, as fees of the clerk of said court, for all services to be performed by him therein, in lieu of all other fees heretofore charged, except as hereinafter provided, the sum of seven dollars and fifty cents."

That the proceeding contemplated by the statute is essentially civil in nature appears clear.

A county is authorized to pay the fees of officers only in a criminal case prosecuted in the name of the state and then where the defendant is insolvent or discharged (Art. XVI, §9, Florida Const., §939.15, F. S.)

Consequently, the only statute under which the clerk may receive a fee is found in §28.241(1), F. S., requiring the filing fee of the clerk to be paid by the "...party or parties so instituting such action, suit or proceeding...".

Of course, the court before which the petition is pending may require payment of the costs by the respondent.

September 3, 1954.—054-215.

UNIFORM SUPPORT OF DEPENDENTS LAW—CONTEMPT
CITATION—SHERIFF'S COSTS—PUBLIC FUNDS
—LIABILITY

QUESTION: Where a respondent in a support action brought under the Uniform Support of Dependents Law fails to make payment of sums which he is ordered to pay for the support of his dependents in other states, may the sheriff's costs incurred in serving a contempt citation be paid out of public funds?

To: *Honorable A. T. Cooper, Assistant State Attorney, Clearwater, Florida:*

On July 17, 1953, in my opinion 053-62, I expressed the opinion that the clerk's fees and the sheriff's fees in cases instituted under the Uniform Support of Dependents Law must be paid by the petitioner except where the petitioner is relieved of such payment in counties having a population of 180,000 or more under the provisions of §58.09, F. S. Along the same line were my opinions 053-334, dated December 22, 1953, and 054-42, dated February 19, 1954.

When a respondent in a support action brought under the Uniform Support of Dependents Law fails to make payments which he is required to make for the support of his dependents, without legal excuse, he is guilty of a civil contempt and punish-

ment for such a contempt is remedial and for the benefit of the petitioner, rather than for the vindication of the dignity of the court, except, of course, that under unusual circumstances the disobedience of the Court's order may be of such a character and in such a manner as to indicate a contempt of the Court rather than a disregard of the rights of the adverse party.

Such a contempt proceeding is between the original parties to the suit and is instituted and tried as a part of the main cause. (See: Seaboard Airline Railroad Company v. Tampa Southern Railway Company, 134 So. 529.)

Therefore, it is my opinion that the rationale of the above mentioned opinions applies to sheriff's costs incurred in serving contempt citations in such cases as well as to all other costs incurred therein, and that your question is properly answered in the negative.

CHAPTER IX

ELECTORS AND ELECTIONS

QUALIFICATION AND REGISTRATION OF VOTERS

April 30, 1954.—054-106.

REGISTRATIONS—VOTING—PHYSICALLY HANDICAPPED AND ILLITERATE PERSONS—ASSISTANCE

QUESTIONS: "1. Should a person claiming to be illiterate offering to vote but asking assistance be allowed to vote if the registration books do not show such facts? (§97.061, F. S.)

"2. Should a person desiring to vote and have assistance because of blindness be able to have such assistance unless the registration books show on his registration that he was blind? (§97.061)

"3. Should an elector claim assistance because he 'is unable to mark his ballot and sign his name' have such assistance unless the registration books show such disability? (§97.061)"

To: Honorable R. A. Gray, Secretary of State:

Subsections (2) and (3) of §97.061, F. S., are quoted:

"(2) If an elector is unable to mark his ballot or sign his name, the registering officer shall sign the elector's name and enter his reasons upon the register.

"(3) (a) If physical infirmity is reason for inability to write he shall state that fact.

"(b) If illiteracy is claimed as reason for inability to write upon the registration book, identification slip or ballot, then upon submitting satisfactory proof that the person cannot write his own name, the applicant may be allowed to mark the registration book, identification slip or ballot by using the 'X' mark as means of writing his signature. The supervisor shall, in addition to entering that fact on the books, enter a full description of the person, giving his height, approximate weight, color, complexion and color of eyes.

"(c) Any person now registered as an illiterate shall comply with this section before January first, 1954. The purpose of this procedure is to obtain accurate information concerning those who are actually illiterate and not merely claim illiteracy for the purpose of registering as illiterate."

This quoted matter originally appeared in §1, Ch. 26870, Laws of 1951 (Election Code of 1951). Apparently it is a revised

version of former §97.06, F. S. (§6, Ch. 25391, Laws of 1949—permanent registration system) and former §102.21, F. S. (§14, Ch. 6469, Laws of 1913 and §3, Ch. 25388, Laws of 1949—primary registration laws).

Sections 101.051 and 101.48, F. S., are quite similar, the former applicable where paper ballots are used and the latter where voting machines are used. These sections provide the procedure to be followed when an elector requests assistance in connection with voting. Because of similarity in wording, it is sufficient here to quote and discuss relevant portions of §101.051. This section provides in part that, "Where any elector is unable to write, or is incapacitated for writing, or because of blindness, or inability to read, or physical incapacity, or is unable to prepare his ballot *and such disability is shown on the registration record*", the clerk or one of the inspectors shall place the person under oath and the person shall be subjected to the detailed examination provided in said section as prerequisite to assistance in voting.

Sections 101.051 and 101.48, F. S., are revised versions of former §100.36, F. S., which in turn derived from §3, Ch. 18407, Laws of 1937.

Sections 101.061 and 101.52, F. S., are similar except that the former is applicable where paper ballots are used and the latter where voting machines are used. They deal with election officials or some other person permitted to assist an elector in voting under the circumstances set forth in the sections. These sections apparently derived from former §99.30, 99.32, 99.56 and 100.22, F. S., which in turn derived from provisions set forth in Ch. 4328 and 4329, Laws of 1895, Ch. 13893, Laws of 1929, and Ch. 20422, Laws of 1941.

At this point it is well to note that §101.061 and 101.52, may respectively be construed in *pari materia* with §§101.051 and 101.48, F. S. It is further well to recognize at this point that the assistance which may be afforded an elector as provided in §§101.061 and 101.52 is permitted only after there has been full compliance by the registrant with Sections 101.051 or 101.48, depending upon whether paper ballots or voting machines are used.

Under our Constitution it is not required that an elector shall be able to write as a prerequisite to registration and voting. Nevertheless, reasonable requirements are permitted in connection with the registration of those who cannot write because of physical disability or illiteracy. The provisions set forth in above-quoted subsections (2) and (3) of §97.061 are reasonable requirements in relation to such handicapped electors.

There is the general rule of statutory construction that where a statute relating to elections is ambiguous as to meaning and application, it is liberally construed in favor of the right to vote. *42 Am. Jur. 908*. There is the further general rule that where the law fixes the duties of registration officers relating to the registration of electors, the failure of such officers, except as to man-

datory provisions of such laws, may not be urged to disfranchise electors. *People vs. Earl, Colo., 94 P. 294.*

Since the adoption of the Election Code of 1951, all registrations should have met the requirements of subsections (2) and (3) of §97.061; and the effect of subsection (3)(c) of said section is that on and after January 1, 1954, illiterate persons who were already registered at the time of the adoption of the law were required to see that the provisions of subsection (3)(b) of said section had been complied with.

A distinction is made in §97.061 between those unable to write because of physical incapacity and those unable to write because of illiteracy. As to the former class of electors, no detailed physical description is required. It is admitted that the registration records should evidence the nature of their impairment. However, even though such records are silent on the point, before such electors may obtain assistance in voting, they must be subjected to the detailed examination set forth in §§101.051 or 101.48, depending upon whether ballots or voting machines are used. The entry on the registration records of the nature of the disability reasonably could contribute little to the purity of the ballot; indeed, the absence of such an entry could hardly handicap election officials, particularly in view of the detailed examination of a physically incapacitated elector prerequisite to his right to assistance in voting.

On the other hand, the provisions of subsections (3)(b) and (c) of §97.061, relating to the registration of an illiterate person, involve additional considerations. Obviously the requirement that a detailed description of a person claiming illiteracy shall be entered on the registration books is to make it possible for election officials, when confronted by an elector claiming illiteracy, to satisfy themselves that such person is the identical person whose name and description appears on the registration records.

In view of the foregoing, in my opinion the questions are answered as follows:

(1) From the time of the adoption of Ch. 26870, Laws of 1951, as a matter of law illiterate electors have been charged with the knowledge of the provisions of subsections (3)(b) and (c) of §97.061, F. S.; they have been charged with notice that registrations of illiterate electors made subsequent to the effective date of said Ch. 26870 were required to be accompanied by the registrant's detailed personal description as prescribed; and, further, they have been charged with the knowledge that if they registered prior to the effective date of Ch. 26870, that on and after January 1, 1954, it was incumbent upon them to ascertain that such detailed descriptions required by these provisions of law appear upon the registration books in connection with their registration. It is to be observed that the duty of seeing that the registration of an illiterate elector meets the requirement of this law falls primarily upon the registration officer; on the other hand, as to those persons who were registered prior to the effective date of Ch. 26870, the duty devolved upon them to

present themselves to the registration officer by January 1, 1954, or thereafter, so that the registration officer could enter their required personal descriptions in connection with their registrations.

In those instances where the supervisor of registration finds that the description of an illiterate registrant does not appear in connection with his registration, and the registration officer is so familiar with the registrant that such officer can enter the required data concerning his personal appearance upon the registration books, the registration officer should do so; and this may be done at any time, even when the books are closed. Furthermore, any illiterate person who has registered and whose registration is not followed by his personal description as required, may present himself to the supervisor of registration at any time, whether the books are open or closed, to permit that officer to enter his correct description upon the registration records; for it is not considered that such would constitute the registering of an elector.

Should an illiterate elector present himself at the polls on election day and request assistance in voting, and should the precinct election board before whom he appears find that the personal description required by the mentioned law does not appear upon the registration records, he should be refused assistance until he shall present to such election board a signed statement from the supervisor of registration that the elector has appeared before such officer, that such officer has entered his personal description, as required, in the registration books, and such statement of the supervisor shall set forth the description so entered by said officer in the registration records.

(2) and (3) It is to be observed that the second question has to do with assisting a blind elector and the third has to do with assisting a person who is "unable to mark his ballot and sign his name." These questions are construed to apply to any person who needs assistance in voting because of physical disability as distinguished from illiteracy. As indicated above in this opinion, while the registration record should indicate the nature of the disability of such a person, there is no requirement that a detailed physical description of the elector be entered upon the books. This being true, the purpose of the law would seem to be met by the detailed examination required of such an elector requesting assistance as set forth in §101.051 and 101.48, F. S., depending upon whether paper ballots or voting machines are used. Hence, even though there is no notation in the registration records of the nature of such a person's physical disability, he should be permitted to vote, with assistance, provided he meets the requirements of the mentioned examination of an elector requesting assistance.

September 17, 1953.—053-247.

SUPERVISOR OF REGISTRATION—STRAW VOTE ON
PUBLIC QUESTION—USE OF BALLOT BOXES
—CLAY COUNTY

QUESTIONS: 1. What authority does the supervisor of registration have for taking the ballot boxes to the various precincts?

2. Since this is not a regular election, is the supervisor of registration authorized to destroy the ballots remaining in the boxes from the last general election?

To: Honorable L. E. Wilson, Supervisor of Registration, Clay County, Green Cove Springs, Florida:

The request for opinion states that all labor connected with this straw vote is to be contributed but that no provision has been made to pay the expenses of the supervisor of registration.

We construe the words "straw vote", as used above, to indicate that this proposed election is not directed or authorized by law to be held, but is a method determined to be used by the board of county commissioners to obtain an expression of the voters of the county with respect to the mentioned issue; and this opinion is conditioned upon such assumption. This being true, there is in law no county purpose here involved and hence, there is no authority for the expenditure of any county funds in connection with this "election".

The above questions are answered in their numbered order as follows:

1. As the supervisor of registration has been requested by the board of county commissioners of Clay County to deliver to the various precincts in the county ballot boxes to be used in said "election", there appears to be no prohibition in our laws which would bar said supervisor from carrying out such request.

2. In view of the time which has elapsed since the 1952 general election and the absence of any specific statute concerning the period for which general election boxes shall remain sealed, there appears to be no impediment in our laws to such boxes being opened at this time and their contents removed; provided, there is not pending at this time any election contest involving the ballots in such boxes. This conclusion is in conformity with our former opinions 050-7 (1949-50 Biennial Report, 121) and 052-169 (1951-52 Biennial Report, 630).

March 24, 1953.—053-68.

ELECTORS—REGISTRATION—RESIDENCE REQUIREMENTS

QUESTIONS: (1) If an individual, applying for registration to vote in Florida, admits that he voted in another state less than a year prior to his application in Florida and that he owns a home in another state, can such person meet the residence requirements for registering in Florida?

(2) What is the meaning of the requirement in Art. VI, §1, Fla. Constitution, that a qualified elector "shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months?"

(3) Is registration for voting purposes a prerequisite to obtaining homestead exemption?

To: Mrs. Tuttle Smith, Supervisor of Registration, Lee County:

Before answering these questions it seems pertinent to make several observations concerning the residence requirements for those who desire to register to vote in Florida.

The words residence, habitation, domicile, home and place of permanent abode referred to in Art. VI, §1, Fla. Constitution, imply that in order to be a qualified elector in Florida one must, among other things, have established the seat of his existence in Florida with the present intention that this State shall be his permanent home as distinguished from a temporary home. There must not only be the intention that some place in this state shall be home, but there must also be the actual physical removal of residence to this state with a corresponding abandonment of any residence outside of this state. Without a coexistence of the fact of residence in Florida and the intention to reside permanently in Florida, there is no legal residence as contemplated by the Constitution. See *Herron v. Passallaigue*, 92 Fla. 818, 110 So. 539; *Wade v. Wade*, 93 Fla. 1004, 113 So. 374; and *Smith v. Croom*, 7 Fla. 81.

There being no fixed rule which will dispose of doubtful or borderline cases, the determination of an individual's legal residence is not always a simple matter. The primary difficulty involved in such a determination is the ascertainment of those facts which sufficiently indicate what a person's intention is in regard to his residence. Although the supervisor has no authority to do investigative work for the purpose of determining such facts, he may rely on the facts which are available, and, to the extent they evidence to the supervisor's satisfaction an individual's failure to comply with the residence requirements for voting, the supervisor may take appropriate steps to prevent such person from voting.

Whether the facts available are sufficient in a given case to show that an applicant for registration has failed to comply with the residence requirements prescribed by law, is a matter which in the final analysis is dependent entirely upon the discretion of the supervisor. Ordinarily one's truthful answer to the question "Where do you live?" or, perhaps to the question "Where is your home?" is enough to show his intention in regard to his place of domicile or legal residence. However, if an individual cannot satisfy a supervisor that his residence in Florida is sufficient to qualify him as an elector, then the supervisor may refuse to allow such person's name to be carried on the county registration records.

With these observations in mind your questions are answered as follows:

(1) As the first question is phrased herein, there is a strong indication that the party involved has not established his residence in Florida for registration purposes. Unless the supervisor is convinced, beyond any doubt, that the person has been a resident of Florida for the requisite period, and that his voting in the other state was improper or perhaps illegal because of his residence here, there is justification in my opinion, for refusing him the privilege of registering to vote in Florida on the grounds that he has not fulfilled the constitutional requirements for a qualified elector of Florida.

(2) The one year residence requirement referred to in Art. VI, §1, Fla. Constitution, means that in order to become a qualified elector in Florida one must have had his legal residence in the state continuously for at least one year prior to his registration, and six months of such period must have been spent in continuous residence in the county in which the applicant desires to be registered.

(3) Registration for voting purposes is not one of the prerequisites to obtaining homestead exemption in this state.

January 21, 1953.—053-11.

**ELECTIONS—CONVICTED FELONIES—CIVIL RIGHTS
—LOSS AND RESTORATION**

QUESTIONS: 1. Does conviction of a Florida citizen of a felony in the courts of the State of Michigan, resulting in imprisonment in the state prison of that state, deprive such person of the civil right of suffrage in Florida under relevant constitutional and statutory provisions?

2. If the answer to the first question is in the affirmative, by what method may the civil right of suffrage be restored to such person?

To: Honorable Carl Holmer, Jr., Supervisor of Registration, Dade County, Miami, Florida:

It appears from the attached correspondence that conviction of a felony under the laws of the State of Michigan in that state does not result in loss of right to vote during the period of incarceration or after release on parole or discharge.

Opinion 051-387, dated October 30, 1951, directed to Honorable Roland X. Droit, President, State Association of Supervisors of Registration, among other things dealt with the question of whether under the provisions of §97.041, F. S., and Art. VI, §§4 and 5, Florida Constitution, conviction of a felony in the United States District Court disqualified a Florida citizen as an elector until he had had his civil rights restored. The findings therein as applied to the first question above are here briefly stated.

Paragraphs (4) and (5) of §97.041, F. S., provide as follows:

“4. Persons convicted of any felony by any court of record and whose civil rights have not been restored.

"5. Persons convicted of bribery, perjury, larceny or any infamous crime in this or other states, or interested in any wager depending on the result of any election."

With respect to these disqualifications, attention is directed to Sections 4 and 5, Art. VI, Florida Constitution.

In view of the holding of our Supreme Court in *Duggar v. State*, 43 So. 2d 860, construing the effect of §40.01 relating to the qualifications and disqualifications of jurors, it is concluded that the provisions of above paragraph (4) of §97.041 apply only to convictions of felonies in courts of record in this state. The question now remains as to whether conviction of a felony in the courts of another state constitutes an "infamous crime" within the meaning of paragraph (5) of §97.041.

On the basis of the reasoning employed in former opinion 051-387, we assume the position that unless and until our courts shall hold otherwise, conviction of a person in the courts of another state of a felony, entailing imprisonment in the state prison of that state, constitutes an "infamous crime" within the meaning of paragraph (5) of §97.041, F. S.

My immediate predecessor in office held in effect in opinion 042-427, 1941-42 Biennial Report of Attorney General, 784, 785, that the State Board of Pardons under its constitutional powers set forth in Art. IV, §12, Florida Constitution, was granted the right to restore civil rights under the laws of this state, the forfeiture of such rights being accomplished under the laws of this state, although in consequence of conviction of a criminal offense in another state. Opinion of this office 050-453, 1949-50 Biennial Report of Attorney General, 625, 626, in effect followed the conclusion set forth in opinion 042-427.

The question occurred again in opinion 052-45, copy of which is attached, to which reference is made.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) As stated above, this question is answered in the affirmative.

(2) Until our courts shall settle the question of whether the State Board of Pardons has the power to restore to a person the civil right of suffrage lost in consequence of that person's conviction of a felony in another state, should such person obtain passage by the Legislature of Florida of a law restoring to him such civil right, the same should be accepted by election officials as fully effecting the restoration of such right.

March 10, 1953.—053-60.

ELECTORS—CONVICTION OF PETIT LARCENY
—LOSS OF RIGHT TO VOTE

QUESTION: Is an otherwise qualified elector deprived of his right to vote when he has been convicted of petit larceny?

To: *Honorable Roland X. Droit, Supervisor of Registration, Sebring, Florida:*

Article VI, §5, Constitution of the State of Florida, provides in part that "The Legislature shall have power to, and shall, enact the necessary laws to exclude . . . from the right of suffrage, all persons convicted of bribery, perjury, larceny or of infamous crime . . ." The Legislature has complied with this mandate through an enactment which now appears as §97.041, F. S.

In a case which arose in 1881, during the June term of the Supreme Court of Florida, it was decided "that a person convicted of a petty larceny is not a qualified elector in this State." It was also stated in the opinion that "The Legislature may, or may not, under this Constitution, so legislate as to annex to petty larceny the punishment of a misdemeanor, but neither such a statute, nor any other which the Legislature might pass, can disconnect from it that punishment which the Constitution makes it the duty of the Legislature to annex to it, which is disqualification to vote." (State ex rel Gordon v. Buckman, 18 Fla. 267)

Although the Supreme Court opinion referred to herein was decided before the adoption of our present Constitution, there have been no substantial changes in the constitutional provisions applicable to the question here involved, and apparently the decision is still the law in this state.

It is therefore, my opinion that the question involved should be answered in the affirmative. An individual who has been convicted of petit larceny by a court of this or any other state is not entitled to vote in Florida until his civil rights have been restored.

REGISTRATION OFFICE, OFFICERS AND PROCEDURE

March 17, 1954.—054-66.

ELECTIONS—PRIMARY—REGISTRATION BOOKS —TIME FOR CLOSING

QUESTION: In view of the fact that the date for the first 1954 regular primary election falls on May 4 and that the thirtieth day "preceeding" or "before" such date is Sunday, April 4, under the provisions of §§98.011 and 98.051, F. S., on what date do the registration books close prior to said first primary?

To: *Honorable R. A. Gray, Secretary of State:*

At the outset let it be understood that this opinion is not necessarily applicable in those counties which have permanent registration systems under special or population acts or which may have other special or population acts, presently in effect, prescribing a time for closing of the registration books different from that set forth in the mentioned sections.

Section 98.011 provides that, "All the registration books close on the thirtieth day preceding the day on which there is a primary or general election and remain closed for five days following the

election. No person shall register at any time other than during the period provided for registration of electors. *In computing the thirty day period, the election day is excluded.*" (Emphasis supplied.)

Subsection 98.051(3) provides that "The books shall close on the thirtieth day before each election at 5 o'clock P.M. and remain closed for five days after the election, after which they shall be open for permanent registration except in bond elections as contemplated by Art. IX, §6, Florida Const."

It is to be observed that §98.011 applies in those counties which have not adopted the permanent registration system provided by §§98.041-98.151, F. S. It is further to be observed that subsection 98.051(3) applies in those counties which have adopted the permanent registration system mentioned in the preceding sentence.

The underscored last sentence of the above-quoted portion of §98.011 provides the yardstick for computing the thirtieth day "preceeding" the day of election. It is to be noted that there is no such provision for computing said time set forth in subsection 98.051(3). However, the underscored portion of §98.011 would seem to be in accord with the general rule for the computation of time under the provisions of law and circumstances here found. Generally on this point see *Simmons vs. Hanne, Fla., 39 So. 77*; *Croissant vs. DeSoto Improvement Company, Fla., 101 So. 37*; *State ex rel Ashton vs. Harris, Fla., 155 So. 100*; *18 Am. Jur. 262, Section 130*. On this point particular attention is directed to the case of *State ex rel Ashton vs. Harris, supra*. In that case it appears that under law then existing candidates were required to file first expense statements not more than thirty nor less than twenty-five days prior to the first primary; that at a time when the first primary election fell on June 4 the Court held that May 11 was the twenty-fifth day prior to said election date for the filing of such statement. Such computation of time was in accord with the general rule mentioned.

Hence, it would appear that the thirtieth day "preceding" or "before" the first primary election on May 4, 1954, within the meaning of §98.011 and subsection 98.051(3), is Sunday, April 4, 1954.

The wording of §§98.011 and 98.051 would seem to indicate that it is not contemplated in these statutes that the registration books should be open for registration except on week-days, as distinguished from Sundays.

It seems to be the general rule that in computing time within which an act required by statute must be done, if the last day falls on Sunday, that day may not be excluded unless the intent of the Legislature to exclude it is manifest. *Simmons vs. Hanne, supra*; *F.E.C. Ry. Co. vs. George, Fla., 107 So. 266*. In relation to the above question, there appears to be no election or other law of Florida under the terms of which the sections involved could be construed as extending the last day for the closing of the

books to Monday, April 5, 1954, the twenty-ninth day before the date of the first primary. Compare Common Law Rule 7(a) which provides, with respect to the time within which acts are required to be done under rules of pleading, that in the event the last day of a period shall fall on a Sunday or legal holiday, the period shall run until the end of the next day which is neither a Sunday nor a holiday.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Under §98.011 and subsection 98.051(3), the registration books shall close prior to the first primary to be held on May 4, 1954, at 5:00 o'clock P.M., Saturday, April 3, 1954.

February 18, 1954.—054-38.

**SUPERVISORS OF REGISTRATION—PERMANENT
REGISTRATION LIST—BIENNIAL CORRECTION—
INQUIRY FORMS TO VOTERS—§90.081, F. S.**

QUESTION: When a county is under the permanent single registration system prescribed by §§98.041 through 98.151, F. S., and forms are being sent out in compliance with §98.081 to determine which registrants are no longer qualified to vote, is the supervisor of registration authorized to mail the forms to registered electors at addresses other than those shown on the registration books?

To: Miss Nora H. Bachand, Supervisor of Registration, Okeechobee County, Okeechobee, Florida:

Section 98.081 provides in part that: "...the supervisor shall mail either to each qualified elector in the county or to each elector who did not vote in any election in the county during the past two years, a form to be filled in, signed and returned by mail within thirty days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Names of electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books. The list of the electors, temporarily withdrawn, shall be posted at the courthouse. Names will be restored to the registration records when the elector in person makes known to the supervisor that his status has not changed..."

It should be noted that the forms contemplated by the section quoted above are to be sent by "mail either...to...each qualified elector...or to each elector who did not vote...during the past two years." To construe this provision literally would be to require a supervisor of registration to know the mailing address, no matter how temporary, of each registrant in the county during the period that the forms are required to be mailed and to send the forms to the elector wherever he may be. Since the Legislature could not have intended to impose such an impossible duty on the supervisor, §98.081 must be construed more liberally in an effort to determine the true intent of the law.

The biennial mailing of the forms required by §98.081, is declared to be a method to be used for "keeping the permanent registration list up to date." Sections 97.091, 98.061, and 98.201, F. S., are evidence of the importance given to the change of an elector's permanent place of residence. When such a change is accomplished without a corresponding change of the elector's registration record, his name is subject to being removed from the list of eligible voters. Since a change of mailing address usually means that there has been a change of legal residence, the value of having the correct address on the records is important in "keeping the permanent registration list up to date."

It is entirely conceivable that an elector may have his legal residence in a county and yet not have a mailing address in the county. Such situations are common where an elector is in the armed forces, employed by the state or federal government, or is for some other reason temporarily absent from his legal residence. An absence of this type does not mean that the elector has changed his legal residence so long as it is his intention to return to the locality in which he professes to have his legal residence, and so long as there is concurrent factual evidence of that intention and of his tie to that locality. (See *Herron vs. Passailaigue*, 92 Fla. 818, 110 So. 539; *Smith vs. Croom*, 7 Fla. 81; *Wade vs. Wade*, 93 Fla. 1004, 113 So. 374; and *Warren vs. Warren*, 73 Fla. 764, 75 So. 35.)

It should also be noted in this regard that an elector may actually have his place of permanent residence in a house located in the county and yet have as a mailing address, a route number that bears the name of a city or town in another county.

Upon consideration of the laws and factual situations referred to herein, it is my opinion that your question should be answered as follows:

The purpose of the forms contemplated by §98.081, F. S., requires that each supervisor mail them only to the address which appears on the registration record of each elector. This should be done even though the address shown is an address outside of the county. If an addressed elector has moved from that address and has neither advised the supervisor of the change nor left a forwarding address, the supervisor should withdraw the elector's name from the registration record in the manner prescribed by §98.081, and restore it to the records only when the elector appears in person and makes known to the supervisor that his status has not changed.

August 4, 1953.—053-185.

**SUPERVISORS OF REGISTRATION—DEPUTIES—MINORS
NOT ALLOWED TO SERVE AS—ESCAMBIA COUNTY**

QUESTION: Is a person between the ages of 18 and 21 years eligible for the position of deputy to the supervisor of registration of Escambia county, Florida?

To: *Honorable Joe Oldmixon, Supervisor of Registration, Escambia County, Pensacola, Florida:*

The request for opinion states that recently Escambia County adopted a civil service law; that 18 year old persons are permitted to take the examinations contemplated by said law; that it has been the policy of the above supervisor to employ registered voters only; that the question now arises whether or not an 18 year old person can lawfully administer an oath.

The civil service law referred to is Ch. 27537, Laws of 1951, as amended by Ch. 29058, Laws of 1953.

This office has ascertained from the office of the Secretary of State that Escambia County is functioning under the registration system provided by Ch. 23903, Laws of 1947, such information deriving from statement of the above supervisor to the mentioned officer subsequent to the 1953 legislative session. Hence, the question is to be related to the provisions of said law concerning the selection and qualifications of deputy supervisors of registration.

It is the popular concept that only registered voters (hence, persons 21 years of age and upward) are eligible to public office in this state. Such is not necessarily true. Our court held in *State vs. George, Fla. 3 So. 81*, and in *In re Opinion of Judges, Fla., 57 So. 351*, that under the Constitution of 1885 it was not intended to make the qualifications of officers other than the Governor and state representatives and senators dependent upon the qualifications for voters. Further, it was held in *Harkreader vs. State, Texas, 33 S. W. 117*, that since the office of a county clerk was a ministerial one and since the constitution and laws of that state were silent with respect to qualifications for a deputy county clerk, a minor could be appointed such a deputy. We find further that it was the common law rule that infants were eligible to public offices which were ministerial; hence, by the same reasoning, a minor could be the deputy of a ministerial officer. *43 C.J.S. 85, Section 24*. It follows, however, that if in the creation of a statutory office or position of employment, qualifications of such an officer or employee are prescribed, the same are to be observed.

The following portion of Section 4 of said Chapter 23903 is quoted:

"The Supervisor of Registration is further authorized and empowered, subject to confirmation by the Board of County Commissioners as hereinafter set forth, to appoint from time to time one (1) Deputy Supervisor of Registration for each sub or branch office to serve at the will of the Supervisor of Registration as his official representative therein in the supervision of registration as a branch registration officer within such precinct or precincts. Each Deputy Supervisor of Registration shall be a qualified elector in said County before he is appointed, and the appointment of each such deputy supervisor shall be confirmed by the Board of County Commissioners meeting in executive session at

its next special or regular meeting following such appointment, and shall observe and carry into effect such rules and regulations governing the registration of persons hereunder prescribed and the preservation and disposition of official registration cards and records as the Supervisor of Registration may at any time establish. The Supervisor of Registration with the approval of the Board of County Commissioners is further authorized and empowered to appoint such number of Deputy Supervisors of Registration as may be reasonably needed to assist him in his office and elsewhere in the performance of the duties imposed upon him by this Act."

It is to be observed that provision is made for the appointment of a deputy supervisor for each sub or branch office; that there is the provision that each deputy supervisor shall be a qualified elector; and that there is the further provision for the appointment of deputy supervisors to assist the supervisor in his office or elsewhere. It is our construction that the provision of the quoted law which requires each deputy supervisor to be a qualified elector in said county has reference not only to deputy supervisors for branch offices but also to deputy supervisors to assist the supervisor in his office or elsewhere. Accordingly, since each deputy must be a qualified elector it follows that he must be 21 years of age and upward.

For the reasons set forth above, the question is answered in the negative.

June 19, 1953.—053-128.

ELECTIONS—REGISTRATION BOOKS—REQUIREMENTS

QUESTION: Under the laws of Florida, in those counties which have not adopted a permanent registration system, is it required that there shall be separate registration books for the primary and general election or are registrations required to be made in *one* book for both the primary and general elections?

To: *Honorable R. A. Gray, Secretary of State:*

In view of the requirements of §98.361, F. S., the relevancy of the question in relation to the duties of the Secretary of State is apparent.

Prior to the comprehensive amendment and revision of our registration and election laws as set forth in the Election Code of 1951 (Ch. 26870, Laws of 1951, appearing as Chs. 97 to 104, F. S. 1951, both inclusive), it may be said that the *general* laws of Florida with reference to registrations were as follows: (1) The permanent system authorized by old Ch. 97, F. S., required to be adopted, with certain exceptions, by all counties by January 1, 1960. (2) Registrations for the general election as set forth in old Ch. 98, F. S. (3) Registrations for the primary election as provided in relevant sections of old Ch. 102, F. S. Thus, under the laws as they previously existed, in a county which had not adopted the permanent system provided by old Ch. 97, and which had no special system fixed by local or population acts, there

were two sets of registration records—those for the primary election and those for the general election.

With adoption of the Election Code of 1951, the permanent system provided by old Ch. 97 appeared in said code as §98.041 to 98.051, both inclusive; and the amended and revised versions of previous *general* laws relating to registrations for general and primary elections appeared in said code in the sections comprising Ch. 98, except those sections setting up the permanent system. The permanent system must be adopted by January 1, 1960 (§98.041). Prior to its amendment in 1953, §98.151 provided the following:

“Until this system is effective in a county, the existing state laws relating to registration of electors shall remain in full force and effect. Upon the adoption of this permanent registration system, all laws in conflict or inconsistent with the provisions of this code shall cease to remain in full force and effect.”

“The existing state laws” were those sections of Ch. 98 not related to the permanent system. While those “existing laws” were intended to provide only a method to be followed until adoption of the permanent system, they provided for a *single* system (particularly, see §98.351, F. S., 1951). This position is consistent with our former opinion 050-480.

Thus, with the adoption of the Code, those counties in Florida which had not previously adopted the permanent system provided by old Ch. 97, and were not under systems provided by local or population acts, were confronted with the requirement to adopt the permanent system provided by §§98.041-98.051 or to conform their “old” system to the requirement of other sections of Ch. 98. In either event, a complete reregistration was required. It is assumed that quite a number of Florida counties, not under permanent systems, continued to use the old double-book system for primaries and general elections; and this assumption is strengthened by the fact, as we are informed, that the Secretary of State sent to counties still under the “old” system for use in 1952, books for each the primary and general election. In the light of the above recitals, it is apparent that from and after the effective date of said Ch. 26870, the double-book system was of extremely doubtful validity.

Since the preservation of the “old” system in Ch. 98 was temporary and to be used only until adoption of the permanent system, it seemed incongruous to require a county to go to the expense of installing a new system to preserve temporarily the “old” system. Hence it is that said §98.151 was amended by §6 of House Bill 1460 at the 1953 session to read as follows:

“Until this system is effective in a county, registration systems existing under other general state laws either as set forth herein or effective at the time of the adoption of Chapter 26870, Laws of 1951, or under population, local or special acts shall remain in full force and effect. Upon the adoption of this permanent registration system,

all state laws in conflict or inconsistent with the provisions of this code shall cease to remain in full force and effect." (Emphasis supplied.)

In view of the foregoing, in my opinion the question is answered as follows:

Those counties which have not adopted the permanent system provided by §§98.041-98.151, F. S., and which have conformed their "old book" system to the single book requirement of Ch. 98, F. S., particularly §98.351 thereof, have a single registration book system for primaries and general elections.

Those counties which have not adopted such permanent system and have not conformed their "old book" system to the single book requirements of said Ch. 98, and which continue to maintain separate registration books for the general election and the primary, as formerly provided in old Chs. 98 and 102, F. S., as such chapters existed at the time of the adoption of Ch. 26870, Laws of 1951, may continue to use such double-book system until such counties adopt the mentioned permanent system.

In view of the above conclusions, it is suggested that the Secretary of State may ascertain from the supervisors of counties which continue to operate under the book system, as provided in our general laws, whether their respective counties operate under the single-book system provided by present Ch. 98, F. S., or under the double-book system as provided by old Chs. 98 and 102, F. S., as such chapters existed at the time of the adoption of said Ch. 26870.

October 13, 1953.—053-268.

SUPERVISORS OF REGISTRATION—STATE ASSOCIATION— MEETINGS—DUES—EXPENSES

QUESTIONS: 1. Are the boards of county commissioners in the several counties of Florida authorized to pay or reimburse the supervisors of registration of their respective counties for the following items of expense?

(1) The annual dues paid by the supervisors of registration for membership in the Florida State Association of Supervisors of Registration?

(2) The expenses of the supervisors of registration incurred in attending the annual meetings of the Florida State Association of Supervisors of Registration including car mileage, and/or bus or train fare from their respective counties to such meetings and return; and meals and lodging while in attendance at such meetings?

(3) Expenses incurred by the supervisors of registration in attending authorized committee meetings of the Florida State Association of Supervisors of Registration including car mileage, and/or bus or train fare from their respective counties to such meetings and return; and meals and lodging while in attendance at such meetings?

To: Honorable Rodney B. Thursby, Secretary, Florida State Association of Supervisors of Registration, DeLand, Florida:

On August 7, 1952, in opinion 052-244 (1951-52, Biennial Report 110-111), the supervisor of registration of Palm Beach County was advised that under §10 of Ch. 23741, Laws of 1947 (providing a permanent registration system for said county) that traveling expenses properly might be allowed such supervisor in connection with his attendance at annual meetings of Florida State Association of Supervisors of Registration and at properly called meetings of the legislative committee of such Association. The opinion did not deal with the availability of county funds under its budget for such expenses. It is to be noted that the opinion involved construction of a section of a particular act and such renders advisable the cautionary words in the succeeding paragraph.

The general law fixing the compensation of supervisors of registration is set forth in §98.161, F. S. A portion thereof provides that the compensation of the supervisor "shall be of such sum in proportion to the amount of work to be done and allowed by his board of county commissioners; provided that the compensation is not less than one hundred dollars per annum." It is recognized that in quite a number of the counties of this state the compensation of the supervisor is fixed by special or population act; and where such has been done under valid legislation the provisions of such acts supersede the provisions of the mentioned general law. As to any county wherein the compensation of the supervisor has been fixed by special or local act, the effect of this opinion is conditioned as set forth below.

It would seem that on the basis of the reasoning in former opinions 049-411 (1949-50 Biennial Report, 380) and 051-303 (1951-52 Biennial Report, 51), copies of which opinions are attached, in those counties where the compensation of the supervisor of registration is controlled by the mentioned general law, the required dues payable to said Association, and actual and reasonable expenses incurred by such a supervisor for transportation (including reasonable mileage where the supervisor uses his own automobile, not in excess of the amount provided for state officers and employees under §112.061, F. S.), lodging and board in attending annual meetings of the Association and duly called meetings of the legislative committee of the Association, are expenses which lawfully may be paid by such supervisor's board of county commissioners; provided that there is provision in the county budget for the payment of such items of expense and, in pursuance of such budget, funds available for said purpose.

In those counties where the compensation of the supervisor is fixed by local or population act, the same rule, as set forth in the preceding paragraph, is applicable to such a supervisor, provided the act fixing the supervisor's compensation does not affirmatively or in effect provide that the compensation payable includes the items of expense dealt with in this opinion.

CANDIDATES, CAMPAIGN EXPENSES AND CONTESTING ELECTIONS

May 21, 1954.—054-123.

GENERAL ELECTIONS—CANDIDATES—QUALIFICATION —WRITE-IN-VOTES

QUESTIONS: (1) Can a person run at the forthcoming general election as a "write-in" candidate, where there is a duly nominated candidate also running, and whose name is printed on the official ballot, without qualifying according to the terms of §99.161, F. S.?

(2) Can such a "write-in" candidate under conditions above outlined, under any circumstances, so as to require the regularly nominated candidate named at the primary election, to prepare for a possible contest that he knows not of?

To: Honorable Samuel A. Harper, Judge, Small Claims Court,
Brevard County, Cocoa, Florida:

I agree with you that if a person whose name is not printed on the ballot announces that he is a "write-in" candidate in the general election for a given office, under the circumstances mentioned in §99.011, F. S., he is a candidate under the election laws.

Generally on this subject, I think the case of *State ex rel Landis vs. Carson, Fla.*, 154 So. 150, is relevant. That case involved the following: Carson qualified as a candidate in the primary. Before the primary election he failed to file a required expense statement; and under law then existing, his name was not printed on the primary ballot and, of course, was not printed on the general election ballot. There was the further provision that if such a candidate in the primary failed to file such expense statement, no committee, officer or board authorized to issue commissions, certificates of election or nomination should issue such a commission or certificate to such a defaulting candidate. At the general election he was elected to office by "write-in" vote and the court held in effect that he was duly elected.

With such remarks, I respond to your questions:

1. The question is as stated by you, except that §"99.161" has been substituted for your "99.061".

It is recognized that a person who does not announce as a candidate may become such a candidate at the general election by reason of voters writing his name in and voting for him. But we here deal with a person who is a "write-in" candidate for office within the contemplation of §99.011, F. S. Such a "write-in" candidate comes within the purview of §99.161, as to which see attached copy of Opinion 052-295 (1951-1952 Biennial Report, 147).

You will note the language of §99.161(3)(a): "Each candidate for nomination for, or election to, public office in the State of Florida, and as a condition precedent to, *qualifying* as such candi-

date, shall appoint one campaign treasurer and designate one campaign depository and shall file the name and address of each with the officer before whom such candidate is required by law to qualify." The underscored word "qualifying" has reference to "qualifying" in the primary. In other words, technically a candidate does not "qualify" to run in the general election. If he is an announced "write-in" candidate and required to comply with §99.161, such statements, reports, etc., provided shall be made and filed by him with the officer with whom he would have qualified had he run in the primary. Further, in my former opinion 051-333 (1951-52 Biennial Report, 147), among other things, I dealt with the question of whether an announced candidate in the primary who had not yet qualified was required to designate a campaign treasurer and depository and begin filing reports required by §99.161. Find attached copy of said opinion 051-333 and note underscored part of the answer on page 4 thereof. In view of such answer, strong argument can be made that even though a person announces as a "write-in" candidate in the general election, no necessity exists that he do anything in relation to §99.161 unless he comes within the provisions of said answer. However, in the absence of court construction, I would recommend that such a person, when he announces his candidacy, should without delay comply with §99.161, even though he accepts no contributions and incurs no expenses in connection with such candidacy.

2. I consider that any person may be a "write-in" candidate in the general election. In that connection, if "knowingly" he fails to comply with the provisions of §99.161, he may invoke the penalties prescribed by §104.27, F. S.

August 2, 1954.—054-180.

EXECUTIVE COMMITTEE—PERMISSIVE CONTRIBUTIONS TO PARTY CANDIDATES

QUESTION: In view of the amendments of §§99.161 and 99.172, F. S., at the 1953 legislative session, as hereinafter explained, is former opinion, 052-199, concerning expenditure of committee funds on be half of party candidates, now subject to reconsideration and modification?

To: *Honorable William A. F. Stephenson, Chairman, Democratic Committee, Pinellas County, St. Petersburg, Florida:*

Attached hereto is copy of said former opinion 052-199 (1951-52 Biennial Report, 197). Among other things, it is to be noted that the effect of said opinion is that all contributions or expenditures from permissive sources as therein described, made to or on behalf of any candidate by a party committee, must have previously been authorized by the campaign treasurer of the candidate to be benefited in accordance with the law, and all contributions of money or other things of value so received by a candidate must be accepted and reported by him in the manner prescribed by law, such contributions subject to limitation as to amount, as therein set forth. Particular attention is directed to that part of said opinion which states in effect that a committee may contribute

or expend in behalf of a candidate funds contributed to the committee by party members only when the candidate receiving the benefit accepts or authorizes the contribution or expenditure, reports the exact amount contributed, and reports the name and address of the original donor; and that the original donor must expressly authorize that his contribution can be given by the committee to a candidate, and that in no event should a donor contribute more than \$1,000 to any candidate. It is to be further noted that in said opinion it was pointed out that among other powers of the committee is its function "to conduct campaigns for party nominees" (see present §103.121(1)(f), (F. S.).

Section 99.161 was amended by §12, Ch. 28156, Laws of Florida, 1953, which added present subsection (9) to said §99.161. Relevant provisions of said subsection are summarized: Subdivision (a) requires the filing of reports by committees of monies or things of value contributed to the committee, or any member thereof, the report to contain the names and addresses of the contributors and the amounts contributed by each and a complete statement of all expenditures authorized, incurred or made by the committee or by any member thereof. Subdivision (b) requires the chairman or secretary of the committee to certify to the correctness of the required reports. Subdivision (c) provides that any contribution received by the committee less than five days before the election shall not be used or expended on behalf of any candidate or political party. Subdivision (d) is quoted: "No state or county executive committee, in the furtherance of any candidate or political party, directly or indirectly, shall give, pay or expend any money or give or pay anything of value or authorize any expenditure or become pecuniarily liable, except for the purpose provided in §99.172."

Section 99.172 was amended by §13 of said Ch. 28156 by adding to the listed purposes for which monies might be expended on behalf of candidacies and by the recognition of political parties as evidenced by the following quoted from the beginning of said section: "No person, in the furtherance of his candidacy for nomination or election for public office in any election, shall himself, or by any other person, or state or county executive committee, or on behalf of any other person, directly or indirectly, give, pay or expend any money or give or pay anything of value, or authorize any expenditure or become pecuniarily liable, except for the following purposes:..."

At the time of the issuance of said opinion 052-199, there were no particular provisions of law relating to contributions to and expenditures of monies by committees on behalf of party candidates. The mentioned amendments to our laws reasonably are construed to remove limitations heretofore existing, and to implement the political party through its appropriate committee "to conduct campaigns for party nominees." In the light of this, said opinion 052-199 is subject to review.

The function of the political party is essential to our American system of government. *Kelso vs. Cook, Ind.*, 110 N.E. 987, quoting from De Tocqueville, *Democracy in America* 187, and 1 Bryce

American Commonwealth 636; *State vs. Felton O.*, 84 N. E. 85, quoting from Sir Henry Sumner Maine, and *Mairs vs. Peters*, 52 So. 2d 793. It is recognized that self preservation is an inherent right of the political party. *Britton vs. Election Commissioners, Cal.*, 61 P. 1115, 51 A.L.R. 115, Ann. 22 L.R.A. (N.S.) 1137. The traditional functions of the party may not be legislatively destroyed, yet the manner in which such functions may be performed are subject to reasonable police regulation in the public interest.

In the cases of *Smith vs. Ervin*, 64 So. 2d 166, and *Ervin vs. Finlay*, 64 So. 2d 175, it was urged that the provisions of §99.161, F. S., were unconstitutional to the extent that they required the individual elector to obtain an authorization from a candidate's campaign treasurer as a condition to such an elector advertising at his own expense on the radio or in newspapers in behalf of such a candidate. In those cases, the Court held in effect that such challenged provisions of §99.161 were valid. Constitutional rights of individual electors are at least as great as associations of individuals, including the governing bodies of political parties.

Hence, it appears we are confronted with an essential function of a political party, a police regulation with strict provisions relating to contributions to and expenditures by candidates and decisions of our Supreme Court upholding such police regulations. Yet, within these legal limitations there remains a permissive field for the exercise of the mentioned essential function of the party through its appropriate executive committee.

A distinction exists between the purposes and aims of the political party and the purposes and aims of such a party's candidate in relation to a general election. In the light of the traditional purposes of the party, §103.121(1)(f), §99.161(9), and the remaining provisions of §99.161, the essential function of the party consists in its urging of political principles which distinguish it from other parties and the election of its candidates to give expression to and demonstrate such principles. That purpose is exercised and met when the party exerts its efforts to elect all of its candidates at any given election, as distinguished from the party concentrating on the election of less than all of its candidates. In contrast, the aim of the individual candidate is the very personal one of being elected to the office sought. While the purposes of the party and its individual candidates are in harmony, each stands in a different relationship to a general election. On the other hand, if the party abandons its permissive function, as above expressed, and exerts its funds and efforts in the direction of one or more but less than the whole number of its candidates, it moves from a permissive field of operation into the personalized campaigns of such selected candidates, and by so doing finds itself in the same position as individuals in relation to the campaigns of such candidates.

Furthermore, one of the purposes of §99.161 is to prevent individuals, in obvious interest of public welfare, from contributing excessive sums to candidates. A contribution to a candidate is an act with personal implications. On the other hand, a contribution to a party committee to be used by such committee

in the permissive function mentioned, as noted above, is not personal to the candidates of the party, hence, reasonably such a contribution to and expenditure by an executive committee will not involve the public interest sought to be served by the mentioned purpose of §99.161.

In view of the foregoing, in my opinion 052-199 is subject to review and is modified to the extent set forth:

(1) There is no limitation in §99.161 or any other Florida statute on the amount an individual may contribute to a political party executive committee to be used and expended by that committee for the permissive function of that committee in relation to a general election, as above set forth and described; and there is no limitation in any of such statutes on the amount which such a committee may expend in the exercise of said permissive function in relation to a general election.

(2) Should a political party committee engage in the expenditure of any of its funds in behalf of one or more but less than all of its candidates running in a general election, such committee will find itself in the same position as an individual elector; and in such instance the conclusions reached in said former opinion 052-199 are applicable. In further explanation of the intent of the preceding sentence, if the political party committee in any instance engages in urging the candidacies of less than all its candidates, then the committee will be subject to the conclusions expressed in opinion 052-199.

(3) Mention is made above of contributions to the political party committee. The provisions of §99.161(1) and 104.091, F. S., prohibiting contributions from certain sources, apply to such a committee. Subsection 104.071(3) provides that it is unlawful for any person or candidate who shall, in order to aid or promote his *nomination* in any election, directly or indirectly, himself or by or through any other person, to "give, pay, expend or contribute any money or thing of value for the furtherance of the candidacy of any other candidate"; but it is to be noted that this provision does not apply to *election* of a candidate but only to *nomination*. Attention is also given to §104.31, F. S., generally known as the "Little Hatch Act." There appears to be nothing in §104.071 and 104.31, or in other statutes which would make it unlawful or irregular for any party candidate to make contributions to his party committee to be used by the committee in the permissive field mentioned above. At this point, however, it should be clearly understood that such a candidate's contribution must be from his *own funds*. Contributions made to him in the furtherance of his candidacy by others may be expended by him only in the manner set forth in §99.161.

December 18, 1953.—053-333.

CANDIDATES—POLITICAL PARTY OFFICES—PARTY
EXECUTIVE COMMITTEES—CAMPAIGN
CONTRIBUTIONS—REPORTS—
AM. §99.161, F. S.

QUESTIONS: 1. Are candidates for election to membership on county, state, and national party executive committees and candidates for election as delegates to a party's national convention subject to the provisions of §99.161, F. S., as amended?

2. Are candidates for election as members of the Sarasota County Hospital Board subject to the provisions of §99.161, F. S., as amended?

3. Are party executive committees required to report expenditures made from their funds on behalf of party candidates for political office in the state of Florida?

To: *Honorable W. A. Wynne, Clerk of the Circuit Court, Sarasota Co., Sarasota, Florida:*

Since you observed in your letter that candidates for certain party offices are not required to pay filing fees it is noted for explanatory purposes that §99.031 F. S. reads in part as follows: "A candidate for nomination for any office is required to pay to the officer with whom he qualifies, a filing fee and committee assessment..." Since candidates for the party offices of state and county executive committeemen are not candidates for nomination but are candidates for election, as provided in §103.111, F. S., as amended, they are not required to pay a filing fee. There is no specific provision for the payment of a filing fee by a candidate for these positions as there is for candidates for delegates to national party conventions and national party committeemen, who are required by §§99.102 and 99.111, F. S., to pay filing fees. Each of the offices mentioned must be classified as a party office rather than a public office of the state and county.

Under our election code all candidates for nomination or election to "political office in the State of Florida" are required to comply with the provisions of §99.161, F. S., as amended, in so far as that section regulates campaign contributions and expenditures and reporting of same. By amendment, at its last session, the Legislature required that state and county executive committees file periodic reports of contributions and expenditures made to or by the committees during a political campaign, thus evidencing its intent that party campaign activities should be subject to financial regulation.

In consideration of the foregoing, and regardless of the fact that most party officials receive no compensation and are not considered to be in the same category as the public officials of the state and county, it is my opinion that candidates for election to such party offices are candidates for "political office in the State of Florida" and should, therefore, comply with the provisions of §99.161, F. S., as amended. For the same reasons it

is also concluded that the members of the Sarasota County Hospital Board are also subject to the provisions of §99.161.

Thus, your questions are answered as follows:

1. Candidates for election to membership on county, state and national party executive committees and candidates for election as delegates to a party's national convention are subject to the provisions of §99.161, as amended, from the time that they announce their candidacies for such positions and should file all reports and in all other respects comply with the provisions of the statute in the same manner as other candidates for political office in the State of Florida.

2. Candidates for membership on the Sarasota County Hospital Board are candidates for "political office in the State of Florida" and should comply with §99.161, as amended.

3. The method by which party executive committees should make their reports of campaign contributions and expenditures is found in §12 of Ch. 28156, Laws of 1953, which is an amendment to §99.161, F. S.

March 17, 1954.—054-67.

ELECTIONS—COUNTY COMMISSIONERS—CANDIDATE'S
NAME OMITTED FROM BALLOT—VIOLATION
OF §99.161, F. S.

QUESTION: Where the campaign treasurer of a candidate for nomination for county office in the primary fails to file a report or reports of contributions and expenditures as required by §99.161(8), F. S., does the duty rest upon the board of county commissioners to omit the name of such candidate from the ballot to be used at said primary election?

To: *Honorable Loran L. Cook, Clerk Circuit Court, Washington County, Chipley, Florida:*

Section 99.161, F. S., pertains to contributions and expenditures of candidates for nomination or election to political office. Subsection (3) of said section requires the candidate to designate a campaign depository and a campaign treasurer. Subsection (8) of said section requires the campaign treasurer of such a candidate to file a report of all contributions to and expenditures of money by or on behalf of such candidate not later than noon on the first Monday of each month preceding the primary election.

Penalties for violation of §99.161 are set forth in §104.27, F. S. Subsection 104.27(2) provides, among other things, that in addition to the criminal penalty prescribed by §104.27(1), the "nomination or election to office of any candidate who knowingly violates the provisions of §99.161, or whose campaign treasurer or deputy campaign treasurer knowingly violates the provisions of §99.161," shall be automatically vacated and the nomination or office filled as in other cases where a vacancy occurs.

It is to be noted that there is no mention in these penalty provisions to the effect that violation of §99.161 shall be grounds

for the refusal to include on the ballot the name of a candidate involved in such a violation. There is the specific penalty that in the event of such a violation the *nomination* of an involved candidate shall be automatically vacated. It is recognized that penal statutes are strictly construed; and it does not appear that the mentioned penalty relating to vacating a *nomination* properly may be invoked prior to a *nomination* in the primary. There can be no vacancy in nomination until there has been a nomination. *State ex rel Chamberlain vs. Tyler, Fla., 130 So. 721.*

Certain provisions of §99.161 have been sustained as valid in the cases of *Smith vs. Ervin, Fla., 64 So. 2d 166*, and *Ervin vs. Finlay, Fla., 64 So. 2d 175*. Sections 99.161 and 104.27 were originally incorporated in Ch. 26819, Laws of 1951. The reason for the adoption of §99.161 as obvious and is recognizable as justified; however, its efficacy must depend upon enforcement of the penalty provisions of §104.27 in event of violation. Certain candidates are required to qualify with the Secretary of State and others with the Clerks of the Circuit Court of the several counties. If a candidate, required to qualify with the Secretary of State, is nominated in the primary, and the records of said official's office disclose a failure on the part of said candidate to comply with any provision of §99.161, the duty rests upon that official to determine whether in his judgment the candidate knowingly violated said law. In the event he shall determine that the candidate did not knowingly violate the statute, he shall, in pursuance of §99.121, F. S., certify the name of such candidate to the proper Board or Boards of County Commissioners for printing upon the general election ballot; but should he determine that said candidate knowingly violated any provision of §99.161, he should do the following: (1) Refer the matter to the proper prosecuting attorney. (2) Notify the candidate that his name will not be certified for printing on the general election ballot. (3) Notify the proper executive committee of the political party of which the candidate is a member that a vacancy in nomination exists with respect to the office involved. If a candidate, required to qualify with a clerk of the Circuit Court, is nominated in the primary, and it is apparent from said official's records that said candidate failed to comply with any provision of §99.161, the duty rests upon said clerk to call such failures to the attention of his board of county commissioners, which board shall thereupon determine if said candidate knowingly violated such law. If said board shall determine that the candidate did not knowingly violate the provisions of §99.161, it shall cause his name to be printed on the general election ballot; however, if such board shall determine that said candidate knowingly violated the provisions of said statute, they should do the following: (1) Refer the matter to the proper prosecuting attorney. (2) Notify the candidate that his name will not be printed on the general election ballot. (3) Notify the proper executive committee of the political party of which the candidate is a member that a vacancy in nomination exists with respect to the office involved.

In view of the foregoing, the question is answered in the negative; that is to say, that where the campaign treasurer of

a candidate fails to file the report or reports as required by §99.161(8), as described in the question, no authority rests in the board of county commissioners to omit the name of such candidate from the primary election ballot.

March 19, 1954.—054-72.

ELECTIONS—PRIMARY BALLOT—PARTY EXECUTIVE
COMMITTEE MEMBER—NAME OF UNOPPOSED
CANDIDATE

QUESTION: Where a candidate for the office of member of a party executive committee has no opposition, is it required that his name be printed on the primary election ballot?

To: *Miss Hattie L. Coles, Supervisor of Registration, Leon County, Tallahassee, Florida:*

Prior to adoption of the election code of 1951, this question was answered in former opinion 050-196 (1949-50 Biennial Report, 129) as follows: "Candidates for the party offices of . . . executive committeemen and committeewomen who are unopposed for the party offices they seek, shall not have their names printed on the ballot used in the . . . primary. (See §§102.01, 102.34 and amended §102.72, F. S.)."

In said election code, §§101.25, 99.041 and 103.101, F. S., respectively, are the revised versions of the former sections mentioned in the preceding paragraph. The new sections are in harmony with the former ones except there is a difference in wording and possible effect of present §99.041 and former §102.34.

The pertinent part of former §102.34 is quoted:

"provided, that whenever the number of candidates of any political party for any office or position shall not exceed the number required to be nominated or *elected* to said office or position, the names of such candidates shall not be printed on the official primary election ballot, but such candidates are declared to be nominated for such office, or *elected* to such position." (Emphasis supplied.) The relevant part of §99.041 is quoted:

"except when there is only one candidate of any political party qualified for an office, the name of the candidate shall not be printed on the primary election ballot, and such candidate is declared nominated for the office."

A part of §101.25, provides: "The nomination of all candidates for all elective state, congressional and county offices, for United States senator and for the election of members of the state, congressional and county executive committees is made in the manner provided in this code."

Section 103.111, F. S., provides for the election of members of state and county executive committees in the primary.

These are the only references in the election code pertaining to the *election* of the mentioned party offices. Such was characteristic of the primary election laws existing prior to the adoption of the code, with the exception of the quoted provisions of former §102.34. In other words, the parts of the code pertaining to primary elections are concerned with *nominations* as distinguished from elections. For example, a candidate qualifying for the primary must file the candidate's oath (§99.021, F. S.), the loyalty oath (§986.05, F. S.) and filing fee and committee assessment, if any (§99.031, F. S.); and in these sections there is reference only to nominations of candidates in the primary. Yet for years our primary election laws have been construed to apply to the *election* of these party offices. Hence, where in the laws reference is made to nomination of candidates, such has been construed to include the "election" of these party officers. Particular attention is directed to that part of §99.041 which provides that, "A candidate who has filed a sworn statement, paid a filing fee and committee assessment is entitled to have his name printed on the official primary election ballot." This is construed as applying with equal force to candidates for nomination for political office and candidates for election to these party offices. Thus it is apparent that there is no provision in our laws for a write-in vote on the primary election ballot with respect to candidates for nomination for public office or candidates for election to these party offices.

Respectable argument can be made that since, in the revision of former §102.34 by §99.041, the words in the former section, "or elected", were not included in the latter, there was evidenced a legislative intent to change the effect of the former section in relation to these party offices. However, reasonably in view of the consistent construction of our primary election laws as noted, it would seem to have been the legislative intent that the following quoted words from §99.041, "such candidate is declared *nominated* for the office," shall be construed to include *election* to office of these party candidates.

In view of the foregoing, in my opinion the above question is answered as follows:

The name of a candidate for the office of member of a party executive committee, who has no opposition, is not required to be printed on the primary election ballot, and in pursuance of the provisions of §99.041 such a candidate shall be declared elected for the office he seeks.

March 23, 1954.—054-73.

PARTY COUNTY EXECUTIVE COMMITTEE MEMBER —ERROR IN QUALIFYING

QUESTIONS: (1) Where a candidate in the primary election for the office of member of a party county executive committee, by error in qualifying designated a precinct number which was not the correct number of the precinct of his legal residence, may he at this time be permitted to amend his qualifying papers to correctly state the precinct of his legal residence?

(2) What duty devolves upon a clerk of the circuit court or his board of county commissioners in the instance of a person registered as an independent elector qualifying as a Democratic candidate for nomination in the primary for the office of school board member?

(3) What duty devolves upon said clerk or board in the instance of a person registered as a Democratic elector qualifying in the primary for the office of member of a Republican county party executive committee?

To: Honorable Charles W. Luther, County Attorney, Daytona Beach, Florida:

In my opinion the above questions are answered in their numbered order as follows:

(1) It is our construction of §§99.041, 99.061, 101.35 and 103.111 (2) that candidates for the offices of members of a party county executive committee are required to be elected in the coming first primary; and that candidates for such party offices were required to qualify not later than noon March 15, 1954.

Our Court held in *State ex rel Vining vs. Gray*, 17 So. 2d 228 that a person desiring to qualify as a candidate for nomination for public office in the primary was required to file with the proper officer his qualifying papers and fees prior to the expiration of the time fixed by law for such a candidate to qualify. Our Court held also in *State ex rel Taylor vs. Gray*, 25 So. 2d 492, that where a person seeking to qualify as a candidate for nomination for public office in the primary filed proper qualifying papers but, by mistake, paid insufficient sum to cover filing fee prior to the deadline, even though there was an honest mistake as to the amount of filing fee required, he had failed to comply with the law and had not qualified as such candidate.

It is considered that the situation found in this question is not identical with the facts involved in the mentioned cases. In this instance it is reasonably apparent that, due to honest error, a candidate intending to qualify for the party office mentioned from the precinct of his legal residence, has set forth in his qualifying papers that he is a candidate from another numbered precinct. Only the courts in a proper proceeding could settle this question with finality. The clerk of the circuit court confronted with this question is called upon to exercise his judgment in arriving at a proper decision. Certainly reasonable and equitable principles, in the absence of a court decision on the matter, strongly urge that such candidate be permitted to amend his qualifying papers to speak the truth, submitting to the clerk such sworn statement or other evidence as that officer might require in support of the candidate's position that the mistake was honest error.

(2) Our Court held in *Davis vs. Crawford, Fla.*, 116 So. 41, that the Secretary of State had no power or duty to inquire into the eligibility of a person desiring to become a candidate in the primary who proffered to file with that officer papers and fees

complying in form and amount with the requirements of the primary election laws. In the case of *State ex rel Hall vs. Hildebrand, Fla., 168 So. 531*, the court held that a clerk of the circuit court had neither the responsibility nor authority to pass judgment on the alleged ineligibility of a candidate who properly complied with the form of the primary election laws relating to qualifying.

Section 99.041 F. S., provides that, "A candidate who has filed a sworn statement, paid a filing fee and committee assessment is entitled to have his name printed on the official primary election ballot;..." There appears to be no provision in our primary election laws which would authorize a board of county commissioners to determine at this time the eligibility of a candidate in the primary who has complied in form with the primary election laws relating to the qualifying of candidates.

Conceding that the person contemplated by this question has met the requirements of our primary election laws with respect to qualifying, at this stage in the primary election processes there appears to be no duty vested in either the clerk of the circuit court or his board of county commissioners to inquire into the candidate's eligibility.

(3) This question is answered by the above answer to the second question.

March 24, 1954.—054-75.

ELECTIONS—QUALIFICATION PAPERS—TIME FOR FILING

QUESTION: Under the circumstances set forth below, did the candidates for the offices of member of a party county executive committee file with the clerk of the Circuit Court of their county their qualifying papers within the time prescribed by §99.061, F. S.?

To: Honorable Avery W. Gilkerson, Clerk Circuit Court, Pinellas County, Clearwater, Florida:

We construe the request for opinion as concerned solely with the question set forth above; and this opinion does not deal in any way with the question of the sufficiency of the qualifying papers sent by these candidates to the clerk for filing.

The circumstances related in the request for opinion are substantially as follows:

Under date of March 12, 1954, by registered mail, the qualifying papers for these candidates were mailed in St. Petersburg in an envelope addressed to Miss Clare Kilgore, Deputy Clerk, Pinellas County Commission, Courthouse, Clearwater, Florida, with return receipt requested. The registered item was received at Clearwater, Florida, on March 13, 1954, on which day, Saturday, the Clerk's office was closed. A deputy from the Clerk's office picked up the mail at the postoffice at 8:15 A.M., Monday, March 15, 1954, but the mentioned item, being registered, was not in the Clerk's mail box. At 11:50 A.M. that morning the

deputy again picked up the mail at the post office, at which time this registered item was delivered to him; however, the deputy did not arrive at the Clerk's office with the registered item until 12:30 P.M.

Subsection 99.061(3), F. S., provides, among other things, that candidates for county office shall file their sworn statements, etc., with the Clerk of the Circuit Court of the county not later than noon March 15 of the year in which the primary is held.

In *State ex rel Vining vs. Gray, etc., Fla., 17 So. 2d. 228*, at a time when our law required a candidate for State Senator to qualify not later than February 1, our Court held that where the application, oath and fees of a person seeking to qualify as a candidate for said office did not reach the Secretary of State until 1:00 A.M. on February 2 because of lack of diligence of the transportation company and delay of said person in delivering them for transportation until after 12 o'clock noon on February 1, the Secretary of State was not required to place such candidate's name on the primary election ballot. In *State ex rel Taylor vs. Gray, Fla., 25 So. 2d 492*, a person sought to qualify as a candidate for nomination for public office in the primary, filed proper qualifying papers before the deadline but, by error of both the person and the officer receiving such papers, did not pay the amount of qualifying fee required; and on the authority of *State ex rel Vining vs. Gray, supra*, the Court held that the person attempting to qualify had not met the requirements of law prior to the deadline and hence should not be listed as a candidate by the Secretary of State.

A distinction is to be drawn between the present situation and that found in the Vining Case. There was no lack of diligence on the part of these persons seeking to qualify as is mentioned in such case. On the third day prior to March 15 they mailed their papers at St. Petersburg. The registered item was in the Clear-water post office available for the Clerk on the second day prior to March 15. It was actually delivered to a deputy clerk prior to the deadline.

In my opinion these two candidates for the party offices mentioned delivered to the Clerk of the Circuit Court of their county for filing the mentioned qualifying papers within the time prescribed by §99.061, F. S. Hence, the question is answered in the affirmative.

GENERAL, PRIMARY, SPECIAL, BOND AND REFERENDUM ELECTIONS

March 3, 1954.—054-53.

COUNTY BOND ELECTIONS IN CONJUNCTION WITH GENERAL PRIMARY ELECTIONS—VOTING MACHINES—REQUIREMENTS

QUESTIONS: 1. May a bond election, held on the same day as a primary election, be conducted with the use of paper ballots when the county is otherwise required to use voting machines?

2. When a bond election is held in conjunction with a primary election, how are the total number of persons participating in the bond election determined?

3. When a bond election is held at the same time as a primary election in a county where voting machines are used, to what extent should the elections be separated and distinguished from each other?

To: Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Fort Lauderdale, Florida:

In the absence of any special or local law to the contrary, §101.32 F. S., governs as to the adoption and use of voting machines in a county. That section, as well as §101.36 F. S., indicates that once the voting machines are provided for any county they are to be used at any and all special, primary, and general elections. Since the laws applicable to general elections are also applicable to bond elections unless other provision is made in §§100.201 through 100.351, the requirements as to the uniform use of voting machines are applicable to bond elections.

As to the second question it is intended by §100.281, F. S., (also Art. IX, §6, Fla. Const.), that a majority of the freeholders who are qualified electors in a county must participate in a bond election, and that a majority of those participating must be in favor of the bond issue in order for it to carry. Although a bond election can be held in conjunction with a primary election (§100.261, F. S.), it is a separate general election in the sense that all qualified freeholders may participate regardless of party affiliation. Even though the question as to the issuance of the bonds is permitted to be dealt with at the same time that a primary election is being held, an elector who is qualified to participate in both elections may actually participate, or vote, in only one. In determining the number of freeholders participating in a bond election held under the circumstances here described, the only accurate method is to total the number of votes cast for and against the bond issue. It is hardly reasonable to say that one has participated in an election when he did not register a vote in the election.

Section 100.271, F. S., contemplates that election officials shall perform dual service when a bond election is held in connection with a regular primary election, but since they are separate elections they should be so treated by the election inspection boards. Each inspector and clerk should take a separate oath in regard to each election, and the two elections should be treated in all other respects as though they were each being held on different days. In that regard it would also be necessary for an elector who is qualified to vote in bond elections to sign two signature identification slips, one for each election. The slips should be deposited in separate boxes when the voter hands them to the person in charge of the voting machine to which he is assigned, and they should be handled after the election in the same separate and distinct manner.

Insofar as absentee voting is concerned, a voter who is eligible to vote in both elections and who requests ballots for both

elections on separate application blanks should be sent separate absentee ballot forms, one ballot being the primary ballot of his party, the other being a ballot containing the question as to the issuance of the bonds. The regular primary ballot cannot include the bond question since all persons qualified to vote the primary ballot of a given political party will not necessarily be qualified to vote on the bond question, and since the law governing the preparation of primary election ballots does not authorize and could not reasonably contemplate the appearance of such an issue on a primary ballot. See §§101.141, 101.161, 101.181, and 101.191, F. S.

Upon consideration of the foregoing it is my opinion that your questions should be answered as follows:

1. Even though it might simplify the conduct of a bond election held under the circumstances described in this question if paper ballots were allowed in the determination of the bond question, the law does not contemplate the use of any voting device in such counties other than the authorized voting machines.

2. The total number of qualified freeholders participating in a bond election held in conjunction with a primary election in a voting machine county, can be correctly determined only by totaling the number of votes actually registered for and against the issuance of the bonds.

3. The proposed bond election and the regular primary election should be kept separate and distinct in all phases of the conduct of both, to the extent indicated in the preceding discussion and to a similar extent in regard to any other particulars that may not have been mentioned herein. The necessity for this distinction, and the extent of it, can be recognized when it is understood that the bond election is not a party issue which can be determined in a party primary and must therefore be conducted as though it were a general election in which all qualified voters can participate regardless of party affiliation.

September 16, 1953.—053-244.

MUNICIPAL BOND ELECTION—FREEHOLDER REQUIREMENTS—§100.241(1), F. S.—GRACEVILLE, CITY OF

QUESTIONS: 1. May an otherwise qualified voter, whose only property consists of homestead exempt property, be properly registered as a freeholder and permitted to vote in a bond election called for the purpose of obtaining the approval by the freeholders of the city of the issuance of bonds for water and sewerage improvements?

2. May an otherwise qualified woman voter be properly registered as a freeholder and permitted to vote even though only her husband's name is shown on the deed to their property?

To: Honorable J. M. Cooper, President, City Council, Graceville, Florida:

From the copy of the ordinance of the City of Graceville by which the above mentioned bond election was called, it appears

that "...electors shall be registered as prescribed by the General Election Laws of the State of Florida and such electors shall have the same qualifications and prerequisites for voting as are required in general elections and in addition thereto they shall submit proof by either affidavits, tax receipt, deed or certified copy of deed before the city clerk... Only freeholders who are qualified electors residing in the city of Graceville and have registered or shall register more than five days previous to said election shall be entitled to vote..."

Section 100.241, F. S., a portion of "The General Election Law of the State of Florida" provides that "any person is deemed a freeholder who has an immediate beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land."

On the basis of these provisions it is my opinion that your question should be answered as follows:

1. The fact that the only real property owned by an individual is exempt from taxation by virtue of its being a homestead, does not preclude such individual from qualifying as a freeholder; and, provided that he is otherwise qualified as required by law, such person may participate in the above described bond election.

2. A wife is not a freeholder solely by virtue of the fact that her husband owns the fee simple title to real property. Even though a wife might, under particular circumstances, be able to establish in a court of equity a present interest in land conveyed to her husband only, election officials should disregard any claim of a wife to such an interest until it is judicially established. (See 1949-1950 Biennial Report of the Attorney General, P. 203.)

February 2, 1954.—054-22.

REFERENDUM ELECTION—CONJUNCTION WITH PRIMARY—COLLIER COUNTY

QUESTION: Can the referendum election required by Ch. 28545, Laws of 1953, be held in conjunction with the first primary election which will be conducted on the first Tuesday after the first Monday in May 1954?

To: *Honorable Ed Scott, Clerk of the Circuit Court, Collier County, Everglades, Florida:*

Chapter 28545 fixes the criminal jurisdiction of the justice of the peace in the fourth justice district in Collier County in certain misdemeanor cases, provides for the payment of a flat fee for handling such cases, and in §5 thereof states: "This act shall not become effective until it is approved and ratified by a majority of the qualified electors voting in an election in which a majority of the registered electors of Collier County shall vote. Said election to be called by the board of county commissioners of Collier County, Florida."

According to the above quoted section the referendum election is to be called by the board of county commissioners. There

is no provision, as in most referendum clauses, for the election to be held at any particular time. Thus, the Legislature apparently intended that the county commissioners should use their discretion as to when the election should be called. That being the case, there is no objection to their holding the election in conjunction with the first primary in May of this year.

Your attention is directed, however, to an opinion of my predecessor in office (1947-1948, Biennial Report, Page 74) wherein the following advice was given in answer to an inquiry as to how a referendum election could properly be conducted at the same time as a primary election:

"I find no provisions under the laws of the State of Florida prohibiting the use in such election of the election officials appointed for the primary election. It is, therefore, my opinion that the same officials may be appointed by the county commissioners to preside at the polls in both elections, *provided separate ballots and ballot boxes are furnished for the special election.* . . . Separate appointment of such officials should be made as to the special election and they should subscribe to a separate oath or affirmation as to each election with respect to their duties to be performed as prescribed by law." (Emphasis supplied)

The necessity for the separate ballots and ballot boxes arises from the fact that the referendum election is a general election to the extent that all registered electors may vote on the referendum issue regardless of whether they are registered as Democrats, Republicans, Independents, or members of other parties that do not conduct primaries.

As conditioned by the preceding quotation, it is my opinion that your question should be answered in the affirmative.

February 17, 1954.—054-36.

ELECTIONS—PINELLAS COUNTY BUDGET COMMISSION—
TERMS OF MEMBERS— CH. 14678,
ACTS 1931.

QUESTION: (1) Under the provisions of Ch. 14678, Laws of Florida, 1931, are members of the Pinellas County Budget Commission from county commissioner districts 2 and 4 required to be nominated and elected in the 1954 primaries and general election?

(2) If the answer to the preceding question is in the affirmative, should the commission heretofore issued to such members of said budget commission for four-year terms following the 1952 general election be corrected to read "until Tuesday after the first Monday in January 1955?"

To: Honorable R. A. Gray, Secretary of State.

It is noted that copy of such request for opinion was sent to each of the following: Honorable Ernest G. Ridinger, Chairman, Democratic Executive Committee of Pinellas County; Honorable

Thomas L. Smith, Chairman, Budget Commission, Clearwater, Florida, and Honorable William C. Cramer, County Attorney, St. Petersburg, Florida.

In connection with this same subject I wrote letters to Mr. Ridinger on January 21 and February 12, 1954, copies of which were sent to you and the other parties to whom you sent copies of your request for opinion. On February 1, 1954, I wrote Mr. Smith and therein referred to the letter to Mr. Ridinger of January 21.

It is to be noted that my letters set forth the reasons why properly an official opinion concerning this subject matter should not be given. Your request deals with your official duties in relation to the issuance of commissions to members of said budget commission and you are entitled to this opinion. Further, because of the apparent uncertainty existing with respect to this question, it is hoped that this opinion will be of benefit.

For the reasons set forth by you in your request for opinion and in my mentioned letters to Mr. Ridinger, your conclusions concerning the cycle of terms of office of members of said budget commission, as set forth below, appear to be correct. No necessity here exists to repeat those reasons.

The commissions issued to the members of said budget commission from even-numbered county commissioner districts for four-year terms following the 1952 general election apparently were in harmony with the returns filed in your office. It would have been rather remarkable had you been so familiar with the law involved to have been advised that the election to office of said mentioned members in 1952 was for unexpired terms as distinguished from full terms.

In view of the foregoing, in my opinion the questions are answered as follows:

(1) The following conclusions set forth by you in your request for opinion are correct: Members of said budget commission from county commissioner districts 2 and 4 should be elected in 1954 for four-year terms; and members of said commission from county commissioner districts 1, 3 and 5 were elected at the 1952 general election for four-year terms. Hence, this question is answered in the affirmative.

(2) Members from said even-numbered districts were elected at the 1952 general election for unexpired terms for the period ending the first Tuesday after the first Monday in January 1955. The law and not the commission issued to an officer controls as to the term of office. *State vs. Taylor, Fla., 146 So. 549*; and also to the same effect see *State ex rel Landis vs. Bird, Fla., 163 So. 248*. Hence, in relation to the commissions issued to members of such budget commission from said even-numbered districts following the 1952 general election, you are authorized to note on such records in your office as pertain thereto such data as shall indicate that the commissions issued are corrected to comply with the law as above set forth.

September 15, 1953.—053-239.

**BOND ELECTIONS — SUPERVISOR OF REGISTRATION—
DUTY TO FREEHOLDER ELECTORS**

QUESTION: Since only freeholder electors may participate in a bond election, as contemplated by Art. IX, §6 Florida Const., what duties devolve upon the supervisor of registration with respect to furnishing to election boards conducting such an election records properly evidencing who are freeholder electors to participate in such an election?

To: Honorable W. J. Bailey, Supervisor of Registration, Brevard County, Titusville, Florida:

It is to be noted at the outset that the above supervisor has specifically requested in this connection if the following procedure would be legal: That the supervisor carefully search the registration records and prepare therefrom a list of names of those who do not appear to be property holders any longer; that he advise such registrants by means of a double postcard of the result of his determination and his intention to correct the registration records to indicate that they are no longer freeholders and that they be advised that if such determination of the supervisor is incorrect, they use the return postcard to apprise him of the fact that they are still freeholders and should be retained on the registration books in such status; that those not replying after a reasonable deadline would be stricken from the freeholder list.

Prior to the adoption of the Election Code of 1951 (revised and amended Chapters 97 to 104, inclusive, F. S.) the statutory procedure with respect to the duties of the supervisor in relation to a bond election were set forth in the several sections of former Ch. 103, F. S. That chapter required the furnishing by the supervisor of a list of freeholder electors qualified to participate in such an election, which list or copies thereof were made available to and used by election boards conducting the election. There has been an amendment of these provisions in the Election Code and reference is made to such amendments.

Section 97.081 provides for the registration of freeholders. Subsection (1) thereof requires that the supervisor at the time of the registration of any person, shall require the applicant to state under oath or affirmation whether he is a freeholder. Subsection (2) thereof provides that the county commissioners may at any time call for a reregistration of freeholder electors for the purpose of securing a new and up-to-date list of freeholders to be used in connection with bond elections; and subsection (3) thereof provides that the latest list of reregistered, qualified freeholders shall supersede prior lists for use in connection with any bond election. Subsection (5) thereof provides that the registration books shall be kept open for at least thirty days and closed at least five days prior to the holding of any bond election.

In all other respects in relation to a bond election, new §§100.201-100.341, F. S., have been substituted for the provisions

of former Ch. 103, F. S. Among other things, subsection 100.241 (2) provides that in any election where only freeholders are qualified to vote the regular registration books of the county shall be used. Thus, it is apparent that the provisions of former Ch. 103 which required the furnishing of a certified list have been superseded by this later amendatory legislation.

While mention has been made above of certain of the provisions of §97.081 and of §§100.201-100.341, any supervisor confronted with a bond election should read the mentioned sections carefully.

In my opinion the above question properly is answered as follows:

(1) It is assumed from the letter of this supervisor that no provision has been made by the board of county commissioners of his county for a special registration or re-registration of freeholders electors in relation to the impending bond election mentioned by him, and that we are, therefore, here dealing with the regular registration records of the county involved. As we have noted above, in any election where only freeholders are qualified to vote, the regular registration books of the county shall be used. This reasonably contemplates that the registration records in relation to a bond election will be used in the same manner that the registration records in relation to a regular state and county election are used. Hence, it is incumbent upon the supervisor to ascertain to the best of his ability who are freeholders and to indicate upon such registration records the registrants who are freeholders.

(2) The supervisor of registration in connection with this matter may as to any registrant, after careful investigation, indicate on the record that such registrant is not a freeholder even though on some previous date he was registered as a freeholder elector.

(3) In the absence of any method in the statute for a supervisor to ascertain on a given date who are and who are not freeholder registrants, it is considered that the method which this supervisor has suggested as set forth above, is a reasonable method for him to use in connection with the discharge of his duty to have the registration records evidence only those who are freeholders. The preceding statement is conditioned to this extent: In any instance where there is a failure of a registrant to return such a card, should the supervisor ascertain that the registrant is still a freeholder, the failure to return such a card would not justify the change of freeholder status of such a registrant on the records.

October 6, 1953.—053-260.

SUPERVISOR OF REGISTRATION — BOND ELECTIONS—
FREEHOLDER STATUS—OPENING BALLOT BOXES—
ALACHUA COUNTY

QUESTIONS: 1. May the supervisor of registration of Al-

achua County open ballot boxes and remove therefrom and destroy ballots voted at the following elections in said county in 1952: the two regular primaries, the special primary for nomination of a candidate for Justice of the Supreme Court, and the general election?

2. In view of the provisions of Ch. 27381, Laws of 1951, may a person who is a freeholder but who is not registered in the special registration book prescribed by said chapter, or in the general county registration books, vote at a school bond election to be held in said county?

3. If a person who is a freeholder and duly registered in the general county registration books fails to register in the special registration book prescribed by Ch. 27381, may such person vote at said bond election?

To: Miss Sue Simpson, Supervisor of Registration, Alachua County, Gainesville, Florida:

Chapter 27381, Laws of 1951, is a special act, applicable in Alachua County, prescribing qualifications of freeholder electors to participate in bond elections called by the Board of Public Instruction or any special tax school district of said county. It became a law on May 28, 1951.

Section 2 of said Chapter provides that, "Only electors who are qualified electors as prescribed by general law and who are freeholders shall be eligible to vote in any such election, and such freeholder elector who shall be so eligible is defined to be only such freeholder elector who has an immediate beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land, and who has duly registered as such freeholder elector for participation in any such election in a special registration book provided therefor."

Section 3 of said chapter provides that the special registration book for "the registration of the freeholder electors who shall be permitted to participate in any such election as freeholder electors thereat or therein", shall be opened by the supervisor twenty days before the holding of such election and shall remain open for fifteen days thereafter.

Chapter 26780, Laws of 1951, designated "The Election Code of 1951", is a codification and revision of the registration and election laws of this state. It became a law June 11, 1951. Section 98.381 thereof provides that, "All registration laws after January 1, 1960, in conflict with the election code of 1951 are repealed . . ." Section 104.44 of said code provides, "All local laws that conflict with the election code of 1951 shall stand repealed after January 1st, 1954". Amendment of the election code by Chapters 28030, 28101, 28156 and 28194, Laws of 1953, did not change the effect of such quoted sections.

The provisions of the election code relating to bond elections generally are found in §§97.081 and 100.201-100.351. While no attempt is here made to harmonize the provisions of above-quoted

§§98.381 and 104.44, subject to the matters set forth in the succeeding paragraph hereof, it would appear that by virtue of said quoted sections, Ch. 27381 will not be disturbed by the provisions of the election code at the time this bond election is held this coming November. It further appears that, subject to the matters in the succeeding paragraph, possible provisions of Ch. 236, F. S., relating to school district bond elections in conflict with Ch. 27381 must yield to the latter.

Since the request for opinion states that the election will be held under Ch. 27381, it is assumed that such chapter has not otherwise been specifically or by implication amended or repealed. It is further assumed that such special act was enacted after due statutory and constitutional notice had been given. This opinion is conditioned upon such assumptions.

Article IX, §6, Fla. Const., provides, among other things, that the counties, districts and municipalities of the state "shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing" in such counties, districts or municipalities may participate, to be held in the manner to be prescribed by law.

For the reasons set forth below, attention is directed to the case of *Holmer v. State, Fla., 28 So. 2d 586*. That case involved a bond election in Dade County. At that time, under the special registration system applicable in Dade County, the registration books closed thirty days before such election. Contention was made in the case that the date the registration books closed, thirty days before the bond election, determined the time for the qualification of electors to participate in such election. Among other things, the court stated: "Certain provisions of §103.06, and other cited provisions, F. S. 1941, including provisions of Ch. 22971, Acts of 1945, if read in isolation might support appellee's contention, but if read in connection with §6, Art. IX, of the Const., we are convinced that a different conclusion must be reached. When the Const. prescribes a remedy, the Legislature may regulate the manner of its exercise, but it is powerless to revoke or change it or to place an undue burden on its exercise. The very terms of §6, Art. IX, point to the election as the date to determine the qualification of freeholders as electors in bond elections, and every logical deduction from the Constitution points to this date. To so hold is not in conflict with the statutes". * * * "It follows that under §6, Art. IX, of the Const., any duly qualified elector who is a freeholder residing in the county, district or municipality where a bond election is being held may participate in such election; that his qualification to so vote is determined as of the date of the election,".

(1) In view of the time which has elapsed since the primary and general elections mentioned in this question, it is assumed that there is now pending no election contest involving the voted ballots in any of said ballot boxes. In the absence of any such contest, such boxes may be opened and ballots destroyed, and the

boxes made available for the elections mentioned in the request for opinion. This conclusion is in conformity with our former opinions 050-7, 052-169, and 053-247.

(2) and (3) It is quite obvious from the provisions of Art. VI, §1, and Art. IX, §6, Fla. Const., the mentioned provisions of the election code of 1951, relevant sections of Ch. 236, F. S., and the provisions of Ch. 27381, Laws of 1951, that only qualified electors (hence, registered electors) who are freeholders, may participate in such a bond election.

By the unambiguous terms of said Ch. 27381, particularly §§2 and 3 thereof, only those qualified electors who are freeholders and who register in the special registration book prescribed by Ch. 27381, may vote in such bond election. For the reasons set forth in the following paragraph, grave doubt exists of the validity of the law thus limiting the freeholder electors to those appearing in said special registration book,—i.e., excluding freeholder electors duly registered in the general registration books. However, this office does not pass upon the constitutionality of statutes.

It is to be noted that if those eligible to vote are those freeholders registered in said special registration book, then the principle announced in *Holmer v. State*, *supra*, that freeholder status is to be determined as of the date of the election, is infringed. Under Ch. 27381 such special book closes five days before the election. Only freeholders who are otherwise qualified may register in such special book. It is quite apparent that if, during the intervening five days, a registrant ceases to be a freeholder he is not eligible to vote in such election. On the other hand, and opposed to the mentioned principle, registrants in the general registration books who become freeholders during said five-day period are restricted from voting. Hence, it is suggested that the legal adviser of the school board holding the mentioned election seriously consider eligibility of registrants in the general registration books who become freeholders during such five-day period.

October 5, 1953.—053-259.

ELECTIONS — FREEHOLDERS OF THE DISTRICT— DEFINITION

QUESTION: What is the meaning of the words "freeholders of the District", as same are used (in identical or similar language) in Sections 3 and 17 of House Bill 1720, 1953 session?

To: *Honorable George W. Smith, Attorney at Law, Clearwater, Pinellas County, Florida:*

This office is limited in the giving of official opinions to public officers of the state, or their attorneys, concerning the legal duties of such officers, upon request for such advice. It appears from the request for opinion that the above attorney has been legal counsel for a group of persons in Pinellas County interested in the creation of the district, mentioned below, since prior to the

drafting of the above act. Hence, it would appear, under the peculiar circumstances here found, in view of the impending election mentioned, that it is appropriate to give advice to such counsel for said interested group. Specifically the inquiry is made by him as to whether a person who is otherwise qualified to vote in the elections mentioned in said Sections 3 and 17 of House Bill 1720, who owns real property in Pinellas County but does not own real property in the proposed district described in said House Bill, is entitled to vote in the elections provided in said sections.

House Bill 1720, subject to its provisions, incorporated certain lands in Pinellas County, Florida, into a special fire control district under the name of "Indian Rocks Special Fire Control District".

Section 17 of the act provides in part that the same shall not become effective "unless and until a special election of the freeholders of said District" shall be first called and "a majority of said freeholders voting at such election, have approved this act and voted for said incorporation."

Section 2 of the act provides a governing board for the district consisting of five commissioners. Section 3 of the act provides that the first Board of Commissioners shall be elected by vote of the freeholders of the district voting at the referendum election held in pursuance of §17 of the act, such elected officials to hold office for the terms stated in said section; and there is a further provision that voting for commissioners shall be district-wide and by freeholders of the district only. Section 5 of the act empowers the Commissioners, among other things, to assess real property in the district to carry out the purposes of the act; and Section 6 of the act provides that such special assessments shall be a lien upon the lands so assessed prior in dignity to all other liens and assessments, except county taxes.

It is relevant to the question to direct attention to constitutional and statutory provisions relating to bond elections. Article IX, §6, Florida Constitution, provides in part and in effect that counties, districts or municipalities of the state shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election "in which a majority of the freeholders who are qualified electors residing in such Counties, Districts, or Municipalities shall participate", etc.

As long ago as 1917 the question of who was a freeholder in a school bond election was dealt with in the case of *Dean v. State, Fla., 77 So. 107*. In that case the court defined a freeholder as, "One who has an immediate beneficial ownership interest, legal or equitable, in the title to a fee-simple estate in land . . ." Subsequent thereto the Legislature by Ch. 14715, Laws of 1931 (heretofore carried in F. S. as Ch. 103) provided for bond elections, and sections of said former chapter are mentioned. Section 103.04 provided that any freeholder, who was a registered elector residing in a county, district or municipality, as shown by the general

registration books thereof, was qualified to vote in any bond election therein. Section 103.06 provided for the preparation of a certified list of qualified electors "determined to be freeholders residing in such county, district or municipality". Section 103.14, obviously following the wording of our court in the Dean case, provided that, "For the purpose of this chapter any person shall be deemed to be a freeholder who has an immediate beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land". This former section of our law now appears as 100.241 (1), F. S.

An examination of the quoted words set forth in the above question, as such words are used in said House Bill 1720, will evidence that they are as exact, or almost as exact, as the description of freeholders in the constitutional and statutory provisions mentioned. It is quite obvious that in bond elections and in the elections contemplated by House Bill 1720, it is required that only freeholders participate for the reason that consequent upon any such election they may find their real property subject to taxes for the purposes inherent in any such election. Thus, reasonably a person otherwise qualified to vote in the elections provided by House Bill 1720, must be possessed of an immediate beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land *located within the boundaries of the proposed special fire control district.*

The above comments appear adequately to answer the question.

VOTING; BALLOTS, VOTING MACHINES, ABSENTEE; PROCEDURE

May 1, 1954.—054-107.

ELECTIONS—APPLICATION FOR AND VOTING ABSENTEE BALLOT—TIME FACTORS

QUESTIONS: 1. Does the time limit set forth in §101.62, F. S., apply to the application for the absentee ballot or the application for the application blank?

2. In view of the third sentence in §101.65, F. S., when an elector applies for an application blank may the supervisor send the elector such blank and an absentee ballot at the same time?

3. In view of the last sentence in §101.67, F. S., is there vested in the Supervisor such discretion in relation to the five-day limit prescribed for making application for absentee ballots that he may send or deliver such a ballot in pursuance of application received subsequent to said deadline?

To: *Honorable Ernest C. Johnston, Supervisor of Registration, Citrus County, Inverness, Florida:*

The questions are answered in their numbered order as follows:

(1) Section 101.62, F. S., provides that certain described electors "...may make application, to the supervisor, either in person or by mail, at any time during the forty-five days preceding any election, *but not later than 5 o'clock in the afternoon of the fifth day preceding such election, upon a blank to be furnished by the supervisor for the official ballot to be voted at such election.*" There follows the form of application for an absent elector's ballot. Again we find in §101.64, F. S., the following: "But the supervisor shall not receive applications for absent elector ballots later than 5 o'clock in the afternoon of the fifth day preceding the election." The "application" dealt with in such quoted matter is not a request for the application blank prescribed by §101.62, but is the executed form of application for an absent voter's ballot; and the mentioned time limit refers to such executed application form.

(2) Section 101.65, F. S., has to do with instructions to absent voters in relation to their voting and returning an absent voter's ballot. The third sentence of said section is quoted:

"The application blank properly filled out shall be mailed in a separate envelope from the ballot envelope."

On its face this quoted wording implies that upon an elector making request for application for an absent voter's ballot, the supervisor may send to the elector both the application form and a ballot. It is remarked that such quoted words did not appear in §101.65 prior to its amendment at the last legislative session.

Prior to its amendment at the 1953 session of the Legislature, the following wording was found in §101.62, F. S.:

"The application blank shall be sent immediately, by mail, to the absent elector by the supervisor, together with an absentee ballot if they are ready for distribution . . ."

which wording is not found in amended §101.62, F. S. The provisions of §§101.63 and 101.64, F. S., reasonably indicate that such ballots are to be mailed to an elector after an application therefor has been received. However, in the light of the above-quoted wording from §101.65 (added in the amendment of that section, as noted) it would appear that if absent voters' ballots are available, upon request of an elector for an application form for such a ballot, both the application form and ballot may be sent to the elector at the same time.

(3) The last sentence in §101.67, F. S., is quoted:

"No application for an absent elector's ballot shall be received or handed out to an elector unless there remains time for the ballot to be mailed to the supervisor by United States mail or personally voted in the office of the supervisor before the deadline for receiving said ballots."

All absentee ballots must be received by the supervisor not later than 5 o'clock in the afternoon of the day preceding the elec-

tion (§§101.65 (1) and 101.67, F. S.). As indicated above, applications for such ballots must be made not later than 5 o'clock in the afternoon of the fifth day preceding the election (§§101.62 and 101.64, F. S.). In the light of the clear meaning of these statutes, the quoted matter from §101.67 is construed as follows: While an application for an absent voter's ballot must be received by the supervisor not later than 5 p.m. of the fifth day preceding the election, even though a request for such an application blank or the executed application is received prior to such deadline, if sufficient time does not remain for the elector to receive and return a ballot by 5 p.m. of the day preceding the election, the supervisor shall refuse such request for application blank or, if said blank is executed, refuse to send a ballot in pursuance thereof. The wording is not to be construed as permitting the supervisor to send an absent voter's ballot to an elector in pursuance of an application therefor received by the supervisor subsequent to 5 p.m. of the fifth day preceding the election.

August 2, 1954.—054-179.

**SUPERVISOR OF REGISTRATION — VOTING MACHINES —
DEPUTY CUSTODIAN—APPOINTMENT—COMPENSATION—
ESCAMBIA COUNTY**

QUESTIONS: 1 Under the provisions of §§101.34 and 101.35, F. S., may a supervisor of registration appoint a full time deputy custodian of voting machines?

2. If the answer to the first question is in the affirmative, may such a deputy custodian's compensation be fixed on an annual basis and paid in equal monthly amounts?

To: Honorable Jack H. Greenhut, County Attorney, Escambia County, Pensacola, Florida:

It is here assumed that no special or population act effective in Escambia County controls the subject matters expressed in said questions; and this opinion is conditioned upon such assumption.

Section 101.34, F. S., designates the supervisor of registration as custodian of voting machines and provides that "he shall appoint deputies necessary to prepare and supervise the machines prior to and during elections and their compensation shall be the same as clerks and inspectors of elections and they shall be paid by the board of county commissioners from the same fund the clerks and inspectors are paid from."

A part of §101.35, F. S., is quoted: "The custodian, the supervisor, shall appoint one or more deputies to be known as deputy custodians of voting machines, who shall be competent, thoroughly instructed, and sworn to perform their duties honestly and faithfully, and shall be instructed at least thirty days before the election." The remainder of this section has to do with the duties of such a deputy custodian.

Section 101.34 derived from former §100.42, F. S., without material change of the latter.

Section 101.35 derived from former §§100.10 and 100.11, F. S. A part of said former §100.10 is quoted: "The authorities in charge of elections may employ one or more competent persons to be known as custodian or custodians of voting machines; who shall be fully competent, thoroughly instructed, and sworn to perform their duties honestly and faithfully, and for such purpose shall be *appointed* and instructed at least thirty days before the election..."

It is to be noted that the underscored word "appointed" in former §100.10 does not now appear in the above-quoted provisions from present §101.35; and reasonably the dropping of the word from the present revised section appears significant. In other words, whereas the former section required that such a custodian be "appointed and instructed" at least thirty days before the election, the revised section requires that such a deputy custodian be "instructed at least thirty days before the election."

Thus, we find in present §101.34 the authority of the supervisor to "appoint deputies necessary to prepare and supervise the machines prior to and during elections"; and in present revised §101.35 that such deputy custodians "shall be sworn to perform their duties honestly and faithfully." These words and the remaining words of said sections reasonably do not seem to require *appointment* of such a deputy custodian prior to each election.

Reference is again made to that part of §101.34 providing that compensation of such deputy custodians "shall be the same as clerks and inspectors of elections and they shall be paid by the board of county commissioners from the same fund the clerks and inspectors are paid from."

Section 102.021, F. S., is quoted:

"Inspectors and clerks of any election and the deputy sheriff serving at the precincts shall be paid for their services by their respective boards of county commissioners, and the inspectors who deliver the returns to the county seat shall receive such sum as the board of county commissioners shall determine but in no event shall the sum exceed one dollar per hour and seven and one-half cents per mile each way while performing such services."

It is recognized that the wording of this section is ambiguous. Recourse to former §99.04, F. S., §24 of Ch. 4328, Laws of 1895, §8 of Ch. 4537, Laws of 1897, §§1 and 2 of Ch. 20448, Laws of 1941, and §3 of Ch. 25834, Laws of 1949, from which present revised §102.021 derived, does not clear up the ambiguity. However, in the absence of a court decision construing the effect of §102.021, reasonably it appears to have been the legislative intent that the limitations concerning compensation appearing therein should apply not only to the inspectors delivering returns to the county seat but also to the inspectors and clerks of elections and deputy sheriffs mentioned in the opening words of the section.

In view of the foregoing, in my opinion the questions are answered as follows:

(1) The reasonable effect of the wording of §§101.34 and 101.35, F. S., is that a supervisor of registration may appoint a deputy custodian of voting machines for a stated period (e.g., annually or longer); that is to say, that the supervisor is not required to appoint such a deputy prior to *each* election. Hence, this question is answered in the affirmative.

(2) We are not advised if the Supervisor of Registration of Escambia County joined with the Board of County Commissioners in requesting my opinion with respect to this question through the county attorney. However, while appointment of such a deputy custodian is a duty vested solely in the supervisor, compensation payable to such a deputy custodian involves responsibilities and duties of a board of county commissioners. Hence, under any circumstances, we do not hesitate to answer this question. The duties of a deputy custodian of voting machines are clearly set forth in said present §101.34 and 101.35. The compensation of such a deputy custodian appears to be clearly set forth in said present §101.34. Such a deputy custodian is required to "prepare and supervise the machines prior to and during elections", all as detailed and reasonably implied in said §101.35. The amount of time required of such a deputy custodian to discharge said mentioned duties in relation to voting machines in Escambia County is a matter peculiarly within the knowledge of that county and is not known to us. Hence the most definite statement that this office can make concerning this second question is that the deputy custodian of voting machines in Escambia County, appointed by the Supervisor of Registration, shall receive the same compensation provided by §102.021 for inspectors and clerks of elections, as such last-named section is construed above, for the actual time required by such deputy custodian to discharge his full duties in relation to said voting machines as said duties are detailed in and contemplated by §§101.34 and 101.35, F. S. Hence, this question is answered in the negative.

October 27, 1954.—054-243.

SUPERVISORS OF REGISTRATION—WRITE-IN VOTING

QUESTIONS: 1. In connection with write-in voting, must the voter place an "X" mark in the square following name so written in?

2. What is the correct procedure for precinct election boards and county canvassing boards to follow in counting and canvassing write-in votes where the candidate's name varies as to spelling?

To: *Mrs. Rosemary Richey, Supervisor of Registration, Indian River County, Vero Beach, Florida:*

These same questions were dealt with by me in my former opinion 050-513 of November 1, 1950, copy of which opinion is attached.

In arriving at the answer to the first question in said opinion, we were called upon to apply rules of statutory construction in relation to former §§99.19 and 99.29, F.S., with the result that we held in said opinion that it was not necessary to place an "X" mark

after the name of a "write-in" candidate to constitute a valid vote for such candidate. *Since the issuing of said opinion our statutes have been subjected to certain change and revision which require an abandonment of such position formerly asserted.*

Section 101.011, F.S., was last revised at the 1953 session of the Legislature. Subsection 2 thereof provides that, "At a general election an elector may vote for any person possessing the qualifications to hold the office for which the vote is cast other than those whose names are printed on the ballot by writing in the name of such person in the blank space provided and place an 'X' mark after the name."

Section 101.191, F.S., sets forth the form of the general election ballot. The following instructions appear in said form: "To vote for a person whose name is printed on the ballot, mark a cross (X) in the square at the RIGHT of the name of the person for whom you desire to vote. To vote for a person whose name is not printed on the ballot write his name in the blank space provided for that purpose." These printed instructions are in accord with §101.151(5), F.S., setting forth the specifications for the general election ballot. It is to be noted that the two sections mentioned in this paragraph were last revised at the 1951 legislative session.

Were it not for the mentioned provision in §101.011, F.S., it is apparent that in pursuance of the printed instruction on the ballot a valid vote for a write-in candidate would be accomplished by merely writing in the name of such candidate. However, §101.011, F.S., appears to be the last expression of our Legislature upon this subject. Furthermore, there is the elementary rule of statutory construction that separate statutes relating to the same general subject matter are to be construed in *pari materia* and given effect unless irreconcilable conflicts exist between the provisions thereof. E.G., *Peninsular Industrial Insurance Company vs. State, Fla.*, 55 So. 398; *State vs. Givens, Fla.*, 37 So. 308; *State vs. Bowden, Fla.*, 150 So. 259. Applying such rule, reasonably it seems that the instructions for write-in voting appearing on the form of ballot is to be construed in the light of §101.011(2), F.S.

The discussion of the second question in said opinion 050-513 is applicable to the second question set forth above.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) A valid vote for a write-in candidate on the general election ballot requires that the voter shall place an "X" mark in the blank space on the ballot following the name of the candidate written in by the voter.

(2) This question is fully answered by the answer to the second question as set forth in former opinion 050-513.

April 15, 1954.—054-88.

DEPUTY SUPERVISOR OF REGISTRATION—
ATTESTING WITNESS—ELECTOR'S CERTIFICATE—
ABSENTEE BALLOTS

QUESTION: May a deputy supervisor of registration, duly ap-

pointed and functioning as contemplated by §98.271, F. S., act as an attesting witness under the supervisor's seal to the execution by a voter of the "Elector's Certificate" in connection with an absentee ballot, as provided by §101.64, F. S.?

To: Honorable Hugh M. Carlton, Supervisor of Registration, Polk County, Bartow, Florida:

Section 98.341 (3), F. S., provides that, "The supervisor is empowered and directed to attach an impression of his seal upon official documents and certificates executed over his signature, and take oaths and acknowledgments under his seal in matters pertaining to his office."

Section 98.271, F. S., provides, in part, that each supervisor shall select and appoint, subject to removal by him, as many deputy supervisors as may be necessary, "who shall have the same powers and whose acts shall be as effective as the acts of the supervisor."

Under §101.64, F. S., voted absentee ballots shall be delivered to the supervisor in a sealed white envelope, enclosed in a second envelope, addressed to the supervisor and "bearing on the back side of this 'Return Envelope'", a certificate substantially as follows:

"I, _____, do solemnly swear, or affirm, that I am a resident of _____ precinct of _____ county or of the _____ precinct or ward of the city of _____ in the county of _____, State of Florida, and have been a resident of such county or city for six months and of this state for one year and am entitled to vote in such precinct; that I will not be in the county during the time the polls are open (or that I am too ill to come to the polls.)

" _____
(Elector's signature)

"Subscribed and sworn to before me this _____ day of _____, A.D., _____, and hereby certify that the affiant exhibited the enclosed ballot to me unmarked; that he then in my presence and in the presence of no other person, and in such manner that I could not see his vote, marked such ballot and enclosed and sealed the same in the ballot envelope; that the affiant was not solicited or advised by me for or against any candidate or measure.

" _____
(Attesting witness)

" _____
(Official title)"

Section 101.65 (2), F. S., provides in part, that, "Any notary public, United States postmaster, assistant United States postmaster, United States postal supervisor, clerk in charge of a contract postal station, or any officer having authority to administer an oath or take an acknowledgment may be an attesting witness." (Emphasis supplied).

It is our construction of the effect of above-quoted §98.341 (3), that administration of the oath required in connection with an application for an absentee ballot (§101.62, F. S.) and administration of the oath in connection with a voter's execution of the mentioned "Elector's Certificate", are matters "pertaining to his (the supervisor's) office", as such words are used in said §98.341 (3).

In view of the foregoing, in my opinion the question is answered as follows:

Since it appears that the supervisor is empowered to administer the oath in connection with a voter's execution of said "Elector's Certificate", and sign same as the "Attesting Witness", and since it appears that a deputy supervisor has "the same powers" as the supervisor, such a deputy may also administer said oath and sign as such witness under the seal of the supervisor. In so functioning, it is suggested that the deputy shall sign as such attesting witness in substantially the following form:

Hugh E. Carlton
Supervisor of Registration
Polk County, Florida
By _____

Deputy Supervisor of Registration

Hence, subject to the suggestions made, the question is answered in the affirmative.

May 28, 1953.—053-113.

BOND ELECTIONS—FREEHOLDERS—PRECINCTS—
VOTING MACHINES—NUMBER REQUIRED—
§101.33, F. S.

QUESTION: In the event of a bond election, at which only freeholder electors will vote, and the question is confined to whether bonds shall be issued or not, and not many electors are expected to participate, would it be permissible under §101.33, F. S., 1951, to use less than one machine for each six hundred registered voters in a precinct?

To: *Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Ft. Lauderdale, Florida:*

Above-mentioned §101.33 provides that: "In precincts containing six hundred or less registered electors there shall be one voting machine and in precincts containing more than six hundred registered electors there shall be available one machine for every six hundred registered electors or fraction thereof *which are expected to participate in any election.*"

It is to be observed that the question is asked in relation to a bond election at which only freeholder electors are permitted to vote, the wording of §101.33 is to be construed as referring to registered freeholder electors.

Notice is taken of the underscored portion of the above-quoted section. Since in connection with the issuance of bonds particular

care should be taken to observe all provisions of law, it is not felt safe to construe such quoted words as permitting election officials to anticipate that less than the total number of freeholders in an election precinct eligible to participate in such election shall vote at such election.

For the reasons set forth above, the question is answered as follows:

There should be supplied for use in each precinct in connection with this bond election a voting machine for each six hundred registered freeholder electors or fraction thereof.

PRESIDENTIAL ELECTORS; POLITICAL PARTIES; EXECUTIVE COMMITTEE AND MEMBERS

January 21, 1954.—054-10.

NATIONAL CONVENTION—ELECTION OF PARTY DELEGATES—REQUIREMENTS

QUESTION: Do the words "in the last election", as appearing in Paragraphs 1 and 2 of §103.101, F. S., refer only to the last general election at which a governor was elected for a full four year term, or may they refer to an immediately preceding general election at which a governor was elected for the unexpired term of a deceased governor, such as will be held in November of 1954.

To: *Honorable Fred C. Petersen, Representative, Pinellas County, St. Petersburg, Florida:*

Paragraph 1 of §103.101, F. S., is as follows:

"Each political party which had cast for its candidate for governor in the last election more than twenty per cent of the total cast for governor shall elect at the second primary in the year 1952 and every four years thereafter the delegates of said party to the national convention, one man and one woman delegate from each congressional district."

Paragraph 2 of §103.101, F. S., is identical to the above quotation except that it authorizes the election of the remaining delegates to which a party may be entitled from the state at large.

In Paragraphs 1 and 2 of §103.101, the words "in the last election" would ordinarily mean the last general election at which a governor was elected for a full four year term. Such an election was held in 1952 and will be held again in 1956.

However, there is no indication that anything was intended by the words in question other than the last general election at which a governor was elected for any term, regardless of length. Since a governor will be elected at the general election in November of 1954 to fill the unexpired term of the late Governor Dan McCarty, it seems that this election will be the "last election" within the contemplation of §103.101, F. S.

Thus, it is my opinion that each political party, which has cast for its candidate at the 1954 general election more than 20% of the total votes cast for governor in that election, shall at the second primary in 1956 elect its delegates to its national convention.

September 18, 1953.—053-248.

COUNTY PARTY EXECUTIVE COMMITTEE—
METHOD OF FILLING VACANCY

QUESTION: A political party county executive committee, heretofore duly organized by electing a chairman, vice chairman and other officers. Recently the chairman tendered to the committee his resignation from said office in writing. The vice chairman has moved her domicile from the precinct from which she was elected as a member of the committee to another precinct in the county; and she still appears to be a registered elector of the former precinct but has not yet registered in the latter precinct. Who may convene, by proper notice, a meeting of the committee for the purpose of filling vacancies in office and the transaction of other business?

To: *Honorable Joseph P. Lieb, Attorney, Citizens Building, Tampa, Florida:*

In our former opinion 052-301 of October 29, 1952, we held that when a precinct committee member moves their legal residence from the precinct from which they were elected to the committee to another precinct in the county, there results a vacancy in the committee office of such person. That former conclusion is here reaffirmed.

To avoid confusion, it is to be borne in mind that we are here concerned not only with membership on such a committee, but with the party office of vice chairman of the committee. Had the question never been raised concerning the eligibility of this vice chairman continuing to function as such committee officer, there seems little doubt that if she had continued to exercise the functions of said office, in good faith, the law pertaining to the acts of de facto public officers would be applicable. *State v. Murphy, Fla., 13 So. 705; State v. Tippet, Fla., 134 So. 52; 43 Am. Jur., 224-237, §§470-486.*

Since the question of the eligibility of this vice chairman has been raised, it is doubtful that the mentioned principles respecting acts of a de facto officer would be applicable here.

However, it is quite obvious that this committee is not to be rendered powerless because of the resignation of its chairman and the apparent ineligibility of its vice chairman. In my judgment a lawful meeting of this committee may be convened by notice of such meeting signed by said vice chairman and also by all other duly elected and functioning officers of the committee.

September 22, 1953.—053-249.

POLITICAL PARTY COMMITTEE MEMBERS—
TERMS OF OFFICE

QUESTION: May a county political party executive committee provide in its constitution that terms of office of all officers of the committee (chairman, vice chairman, secretary, etc.) shall be for two years beginning in June 1954, each officer being eligible for re-election?

To: *Honorable Thomas T. Dunn, Vice President and Trust Officer, St. Petersburg, Florida:*

Pertinent features of §§103.111 and 103.121, F. S., as amended by §40 and §41, Ch. 28156, Laws of 1953, are mentioned.

Subsection 103.111 (2) is quoted:

"The county executive committee of each political party shall consist of two members, a man and a woman, from each precinct within the county, who shall be elected for four years at the first primary held in the year 1942, and every four years thereafter. The members of the committee shall, within thirty days after their election, meet at the county seat and organize by electing from among their members a chairman and a vice-chairman, one of whom shall be a man and the other a woman, and other officers as are necessary."

A portion of §103.111 (3) is quoted:

"Any officer or member of any of the committees may be removed and his or her office declared vacant upon a two-thirds vote of the entire membership of the committee at any regular meeting or at any special meeting, after ten days notice to the membership of the committee that a motion for that purpose will be considered at a special meeting. The removal may be for any cause which in the opinion of two-thirds of the membership of the committee warrants the removal of the member. Any vacancy so created is filled as provided above."

A portion of §103.121 (1) is quoted:

"(a) to adopt a constitution by two-thirds vote, of the full committee,

.

"(g) to do anything that is considered by custom and practice as proper for party committees."

It is to be noted from the above that the proposed constitutional provision will not become effective until election of a new committee in the 1954 primary. It is to be further noted that within thirty days after their election, members of the committee shall "meet at the county seat and *organize* by electing from among their members" the described committee officers. The use of the word "organ-

ize" in the sense of meeting and electing officers, is not novel in our laws. Reference is made to certain of our state administrative agencies and the respective governing bodies thereof.

"Organization" of a board in the sense noted is found in Section 454.05, F. S. (board of law examiners); Section 458.04, F. S. (board of medical examiners); Section 459.05, F. S. (board of osteopathic medical examiners); Section 460.04, F. S. (board of chiropractic examiners); Section 462.04, F. S. (board of naturopathic examiners); Section 466.08, F. S. (board of dental examiners); Section 467.02, F. S. (board of architects); Section 470.06, F. S. (board of funeral directors and embalmers); §471.12, F. S. (board of engineer examiners); §473.06, F. S. (board of accountancy); §476.18, F. S. (barbers sanitary commission). In most of these noted instances terms of officers of the respective boards involved are prescribed (e.g., §§459.05, 460.04, 466.08, 467.01, 470.06, 475.02, F. S.); in at least two instances the term "reorganization" is employed in relation to re-election of officers at stated intervals (§460.04 and 475.02, F. S.); and in at least one instance the words "organize annually" in the sense of electing officers are used (§467.01, F. S.).

Thus the legislative expression found in §103.111 (2) and in the other sections mentioned, reasonably leads to the conclusion that where in the mentioned subsection provision is made for organization of the committee by the electing of officers and no provision is made with respect to their tenure of office or to "reorganizing" the committee at stated intervals, the officers elected at such an organizational meeting hold their offices for the four-year term of the newly elected committee.

It is to be recognized that a committee should not find itself powerless to change officers if such is considered proper for the welfare, purposes and functioning of the committee. The law does not leave the members of the committee powerless in this regard. Such right is granted in the quoted portion of §103.111 (3).

In view of the foregoing, in my opinion the above question is answered as follows:

In the absence of a court construction of the question presented, the position is here assumed that a political party county executive committee may not include in a duly adopted constitution of the committee a provision fixing the terms of office of the officers of the committee, as contemplated by the question.

ELECTION CODE; VIOLATIONS; PENALTIES

July 17, 1953.—053-160.

SPECIAL ELECTIONS—ALCOHOLIC BEVERAGES— SALES ALLOWED

QUESTION: Are the provisions of §104.381, F. S., as amended by Ch. 28194, Laws of 1953, relating to closing of bar rooms, saloons, cocktail lounges, etc., for the period of time and within an area where described elections are held, applicable to special elections?

To: Honorable J. R. Hunter, Jr., Director, State Beverage Department:

Prior to the aforesaid amendment of §104.381, it provided, in part, that, "All bar rooms, saloons, cocktail lounges, and other places for the sale of intoxicating beverages at retail within the area of any state, county, or municipal, general, primary or *special* election" were required to close during the hours and as stated and qualified in the remainder of said section.

The section as amended by Ch. 28194, Laws of 1953, provides in part that, "All bar rooms, saloons, cocktail lounges, and other places for the sale of intoxicating beverages at retail within the area of any state, county or municipal, general, or primary election" are required to close during the hours and as stated and qualified in the remainder of said section.

It is quite obvious that "special" elections, formerly specifically mentioned, are not included in the section as amended.

Specifically the request for opinion mentions "special elections, bond elections, etc." It is relevant to distinguish between a "general" and "special" election.

Recourse to the general law evidences that the term "general election" has been defined in various ways by the courts. The majority rule is that expressed in those jurisdictions which hold that a general election is one provided for by law for the election of officers throughout the state, or certain subdivisions thereof, after expiration of the full terms of the former officers (*Vickery vs. Wilson*, Colo., 90 P. 1034; *People vs. Pressler*, 168 Ill. App. 291; *State ex rel Kline vs. Bridges*, Okla., 94 P. 1065; *Norton vs. Letton*, Ky., 111 S. W. 2d. 1053; *Grant and McNamee vs. Payne*, Nev., 107 P. 2d 307; *State vs. Superior Court of King County*, Wash., 295 P. 730; *Eakle vs. Board of Education of Independent School Dist. of Henry*, W. Va., 125 S. E. 165). In other jurisdictions the term has been taken to mean an election by the people which is open to all electors as distinguished from any limited group (*Kessler vs. Fritchman*, Idaho, 119 P. 692). In still other jurisdictions an election is considered a general one where in pursuance of operation of law it occurs at stated intervals without any superinducing cause except the passage of time (*Marsden v. Haslocker*, Oregon, 85 P. 328). The words "general election" when used with reference to city elections without qualifying words must mean the election for municipal officers in general (*State ex rel Castle vs. Schroeder*, Neb., 113 N. W. 92).

While it follows that these definitions of a general election furnish as to each the definition for a special election, it is noted that generally a special election is defined as one provided for by law under special circumstances or for a special purpose (*Dysart v. City of St. Louis*, Mo., 11 S. W. 2d, 1045; *People ex rel Anderson vs. Czarnecki*, Ill., 143 N. E. 840; *Scovill vs. Ypsilanti*, Mich., 174 N. W. 139; *State vs. Andresen*, Ore., 222 P. 585).

It is of course recognized that where the State Constitution or statutes define such terms, said definitions must control (*Village*

of *Ridgway v. Gallatin County, Ill.*, 55 N. E. 146). Were it not for this last-mentioned proposition, our construction of amended §104.381 would be broader than that set forth below; however, we are confronted with definitions which must be observed.

The election code of 1951, being a revised and amended version of our registration and election laws, is comprised of Chs. 97 to 104 inclusive, F. S. Section 97.021, F. S. deals with definitions, and at the outset provides that certain described words and phrases when used in said code shall be construed as the same are defined in said section. Subsection (2) thereof, as amended by Ch. 28156, Laws of 1953, in effect, defines "general election" as an election held on the first Tuesday after the first Monday in November in even-numbered years for the purpose of filling national, state and county offices and for voting on constitutional amendments as proposed by the Legislature. The definition of "primary election", as set forth in subsection (1) of said section, considered with the definition of "special primary election", as defined in subsection (3) of said section, reasonably leads to the conclusion that the former definition refers to the regular primary election immediately preceding a general election.

It is quite obvious that these definitions of general and primary elections are not applicable to municipal elections. Nevertheless, again reference is made to *State ex rel Castle vs. Schroeder, supra*; further it is quite obvious that it must have been the legislative intent to refer in this section to types of elections similar in nature and applicable to the state, a county or a municipality.

In view of the foregoing, in my opinion the above question properly is answered as follows:

The statute is applicable to the general election held in the State and counties on the first Tuesday after the first Monday in November in even-numbered years; and to the regular primary election immediately preceding such a general election. The statute is further applicable to regular municipal elections, recurring at stated intervals, at which under charter provisions officers are voted for, and to any primary which may immediately precede such regular municipal elections for the purpose of selecting nominees to run in such regular municipal elections. For the purposes of this statute, all other state, county and municipal elections are special elections, which without excluding other special elections, include the regular biennial school trustee election, special primary elections, bond elections and local option elections.

March 2, 1954.—054-52.

ELECTIONS—STATE AND COUNTY OFFICE—
CANDIDATE'S QUALIFICATION—DEADLINE DATES—
LEON COUNTY

QUESTIONS: 1. May candidates file their qualifications for office in State and County elections, after the first day of February?

2. Did the Legislature in passing a law giving candidates for

State and County offices until March 15th, repeal the local Leon County Law which designated February 1st as the deadline for qualifying for State and County offices?

To: Honorable Charlton L. Pierce, Secretary, Democratic Executive Committee, Tallahassee:

We assume that the local Leon County act contemplated by the above questions is Ch. 27684, Laws of Florida, 1951, that it was a validly enacted local act; and this opinion is conditioned upon such assumptions. It seems apparent that the other law referred to is Ch. 26870, Laws of Florida, 1951 (Ch. 97-104, F. S.), the election code of 1951.

Chapter 27684 provided that candidates for "nomination to a county office in Leon County, Florida, shall file their sworn statement and receipt for party assessment, if any has been levied, with and pay their filing fee to the Clerk of the Circuit Court of Leon County, Florida, who shall receive the same in his capacity as Clerk of the Board of County Commissioners of Leon County, Florida, not later than noon February first of the year in which any primary is held;" that all laws and parts of laws in conflict were repealed; and that the act take effect immediately upon its becoming a law.

Legislative history of this act is as follows: Passed the House on June 1, 1951; passed the Senate on June 1, 1951; was not approved by the Governor; and was filed in the office of the Secretary of State on June 11, 1951.

Chapter 26870 (Chapters 97-104, F. S.) was a revision and codification of registration and election laws of Florida. Section 104.44, appearing in said Ch. 26870 and as now carried in F. S. provides: "All local laws that conflict with the election code of 1951 shall stand repealed after January 1st, 1954." Chapter 26870 became effective September 1, 1951. The quoted provision was not changed by the 1953 session of the Legislature but was at said session reenacted as a part of Florida Statutes.

Legislative history of Ch. 26870 is as follows: Passed the House on May 22, 1951; passed the Senate on May 31, 1951; was not approved by the Governor; and was filed in the office of the Secretary of State on June 11, 1951.

Certain rules of statutory construction are mentioned: "In the absence of an irreconcilable conflict between two acts of the same session, each will be construed to operate within the limits of its own terms in a manner not to conflict with the other act. However, when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms." *Sutherland Statutory Construction, 3rd Ed., Vol. 1, 483, Section 2020*. Further, since the last expression of the Legislature prevails, the statute passed last will prevail over a statute passed prior to it, irrespective of whether the prior statute takes effect before or after the later statute. *People vs. Kramer*,

Ill., 160 N. E. 60; *Newbauer vs. State, Ind.*, 161 N. E. 826; *State vs. Schaumburg, La.*, 89 So. 536; *State vs. Marcus, N. M.*, 281 P. 454; *Winslow vs. Fleischner, Ore.*, 228 P. 101; *Buttorff vs. York, Pa.*, 110 A. 728.

In view of the foregoing, the questions are answered as follows:

As to Questions 1 and 2: As noted above, Ch. 27684 pertains only to candidates for nomination to county offices in Leon County and not to state offices. Candidates for nomination for certain state offices must qualify by February 1, and other candidates for state offices have until March 15 to qualify. See subsections (1) and (2) of §99.061, F. S., concerning the times within which candidates for state office may qualify; and such subsections furnish answers to the questions in relation to candidates for nomination for state offices.

Applying the above rules of statutory construction in the light of the legislative history of the mentioned chapters involved, in my opinion §104.44, F. S., did not repeal Ch. 27684, the Leon County local act fixing the deadline for candidates for county offices to qualify at noon February 1; and the reenactment of said section as a part of Florida Statutes at the 1953 session did not effect repeal of said Chapter 27684. It follows that in my opinion candidates for nomination for county offices in Leon County were required to qualify by noon February 1, hence may not properly qualify subsequent to said deadline.

CHAPTER X
OFFICES, OFFICERS AND PUBLIC RECORDS
COMMISSIONS

August 31, 1953.—053-222.

**EVERGLADES FIRE CONTROL DISTRICT MEMBERS—
COMMISSION FEE—PAYMENT—REIMBURSEMENT**

QUESTION: Is the Secretary of State's fee for the issuance of the Governor's Commission to each member of the Board of Commissioners of the Everglades Fire Control District a proper expense to be paid by the District from its funds?

To: Honorable Guy J. Bender, Chief, Everglades Fire Control District, Belle Glade, Florida:

In an opinion prepared during the tenure of my predecessor, Honorable J. Tom Watson, the following statement appeared:

"The fee required by Section 113.01, in my opinion, should be paid individually by those appointed or elected to offices which carry remuneration for services rendered, but should not be an individual charge against those qualifying for a purely non-remunerative office . . .

"The Legislature, in my opinion, did not intend that the individual appointed to such a position should give of his time and also pay out of his own pocket for the privilege of carrying on this important function of state government.

"In the present case, this commission fee may properly be classed as an actual expense incurred by the member while in the performance of his duties . . ." (1941-1942 Biennial Report of the Attorney General, page 97)

Section 379.02, F. S., provides that "the members of the board of commissioners (of the Everglades Fire Control District) shall receive their actual expenses in attending meetings of the board, payable monthly, but shall not receive any salary for their services." In Section 379.04, Florida Statutes, it is provided that " . . . requisitions for expenses of board members . . . shall be disbursed upon requisitions made by the board chairman and two members appointed by said board for that purpose."

Since the members of the board of commissioners receive no compensation, and since it is apparently the intent of the Legislature that they should be reimbursed for all actual expenses necessarily incident to their attendance at board meetings, it is my opinion that in regard to the question presented, the opinion of my pre-

decessor should be adopted and the fees for the issuance of official commissions to the members of the board of commissioners of the Everglades Fire Control District should be considered a proper expense to be paid from the district's funds in the manner contemplated by the above-quoted portion of §379.04, F. S.

February 6, 1953.—053-27.

ELECTIONS—JUSTICE OF PEACE—SMALL CLAIMS COURT
JUDGE—DUAL COMMISSIONS ILLEGAL—ART. XVI, 15,
FLA. CONSTI.

QUESTION: May one person at the same time serve as Justice of the Peace in a county and also as Judge of the Small Claims Court in said county, in pursuance of Ch. 26747, Laws of 1951, in view of the provisions of Art. XVI, §15, Florida Constitution?

To: *Honorable R. A. Gray, Secretary of State:*

Chapter 26747, created Small Claims Courts in counties in the 36,400-37,000 population bracket. Except for the feature of said act noted below herein, it is assumed that such act constitutes valid legislation, and this opinion is conditioned upon such assumption.

The request for opinion states that at the 1952 general election one person was elected Justice of the Peace in a certain district in said county and also Judge of the Small Claims Court in said county, in pursuance of Ch. 26747; that he has qualified and been commissioned as said Justice of the Peace; that he now wishes to qualify as Judge of said Small Claims Court, if such is legally authorized.

It is sufficient here to state that the act mentioned created a Small Claims Court with jurisdiction up to \$250, and provided that beginning with the 1952 general election there should be elected a Judge of said Court for a four-year term, qualified as set forth, with the further provision that, "except, however, a Justice of the Peace may also be a Judge of said Small Claims Court."

In the case of *State v. Ferguson*, 58 So. 2d, 145, our Court held Ch. 26667, Laws of 1951, unconstitutional in the particulars described. In effect, Ch. 23195, Laws of 1943, originally applicable in counties having a population of 260,000, or more, created a Small Claims Court in each Justice of the Peace District in the county, designated the Justices of the Peace as Judges of such courts in their respective districts, and fixed the civil jurisdiction of such courts with respect to claims the same as that granted a Justice of the Peace. Said Ch. 26667 sought to amend the 1943 act by prescribing jurisdiction with respect to claims not to exceed \$300. In the case the court referred to such a Justice of the Peace as ex officio Judge of the Small Claims Court in his district, and held such 1951 act invalid as attempting to vest in the Justice of the Peace jurisdiction beyond that fixed in the Constitution. Generally on this point see also *Advisory Opinion to the Governor*, 58 So. 2d 319.

Chapter 26747, however, did not attempt to make a Justice of

the Peace ex officio Judge of a Small Claims Court. The act is construed as treating the offices as two separate offices; indeed, one person was *elected* to the two offices and now seeks a *commission* for each of them, if proper. Such quite apparently is violative of Art. XVI, §15, Florida Constitution.

The conclusion reached in the preceding paragraph is not construed as rendering Ch. 26747 invalid. Under recognized rules of statutory construction, reasonably the provisions in the act to the effect that a Justice of the Peace may be elected Judge of said Small Claims Court, may be excised without disturbing the remaining provisions of the act. See generally on the point *State v. Patterson*, 39 So. 398; *State v. Phillips*, 70 So. 367. And this mentioned principle is particularly applicable where, as is found in Ch. 26747, the legislation under question has a separability clause. *Smith v. Cahoon*, 283 U. S. 553; *State ex rel. Adams v. Lee*, 166 So. 249, 166 So. 262, certiorari denied in *Lee v. State ex rel. Adams*, 299 U. S. 542, 81 L. Ed. 389.

Our court held in *Advisory Opinion to the Governor*, 79 So. 874, that where a person holds a public office, his acceptance of a commission to another public office constitutes a vacating by him of the former office.

In view of the foregoing, in my opinion the question is answered as follows:

The question is answered in the negative; that is to say, in view of the provisions of Art. XVI, § 15, Florida Constitution, one person may not hold the office of Justice of the Peace in a certain district in a county and also the office of Judge of the Small Claims Court in said county, created by Ch. 26747, Acts of 1951.

If in all other respects the person contemplated by the question is entitled to a commission as Judge of said Small Claims Court, to avoid confusion it is suggested that such commission be issued to him, provided, that this person shall first resign from his office of Justice of the Peace.

LEAVES OF ABSENCE TO OFFICIALS

December 7, 1953.—053-322.

MUNICIPALITIES—EMPLOYEES—SALARIES DURING MILITARY LEAVES OF ABSENCE—§115.07, F. S.

QUESTION: Does §115.07, F. S., require cities to pay their employees their full salary during periods of leave for military service as provided by the act, or can this be construed to mean that the city is only obligated to pay the employee the difference between their regular city salary and the amount paid to them by the armed services?

To: Honorable Edward L. Semple, Office of City Attorney,
Coral Gables, Florida:

Section 115.07, F. S., provides, in part:

"All officers or employees of this state, or of the several counties or municipalities of this state, who are commissioned reserve officers or reserve enlisted personnel in the United States military or naval service or members of the national guard, shall be entitled to leave of absence from their respective duties, *without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercise or other training ordered under the provisions of the United States military or naval training regulations for such personnel when assigned to active duty*; provided that leaves of absence granted as a matter of legal right under the provisions of this section shall not exceed seventeen days in any one annual period; provided, further, that leaves of absence for additional or longer periods of time without pay for assignment to duty with civilian conservation corps units or other functions of a military character may be granted in the discretion of employing or appointing authority of any state, county or municipal employee and when so granted shall have the force and effect of other leaves of absence authorized by this section." (Emphasis supplied)

It is my opinion that the language of the statutes clearly requires the city to pay its employees under these circumstances their full salary regardless of any other income or compensation they might receive from other sources. I am enclosing copy of my opinion issued on August 15, 1951 (AGO 051-273) which discusses in more detail the application of §§115.07, 115.09, and 250.48, to public officers and employees.

POWERS AND DUTIES OF OFFICERS

June 29, 1953.—053-138.

BOARD OF CONTROL—ASSIGNMENT OF SALARY OR WAGES BY PUBLIC OFFICER OR EMPLOYEE— ISSUANCE OF STATE WARRANT TO ASSIGNEE NOT PERMITTED

QUESTION: Where an employee of the University has made an assignment of part of his compensation to a Small Loan Company and the University is given the notice required by the Small Loan Act, may the University issue a warrant to the assignee for the amount of compensation assigned by the employee?

To: Board of Control, Florida State University:

The general rule is that a public officer may not assign his salary but a public employee may do so. (6 C.J.S. 1068) However, §19 of Ch. 26859, Laws of 1951, the general appropriation act, provides that appropriated funds shall be payable to the "ultimate beneficiary." Similar provisions have been in the general appropriations acts for many years.

The funds in question are appropriated funds, and it is my opinion that the general appropriation act prohibits the issuing of a State warrant to an assignee of a State officer or employee of any part of his compensation.

PUBLIC RECORDS

February 11, 1953.—053-32.

COUNTY TAX COLLECTOR—MOTOR VEHICLE REGISTRATIONS—DOCUMENTS AS PUBLIC RECORDS

QUESTION: Where a county tax collector, while acting as agent of the state motor vehicle commissioner in connection with the sale of motor vehicle licenses and license tags, retains in his office copies of applications for licenses and of instruments issued in connection with the registration of motor vehicles, are such records public records open to examination by the public under §119.01, F. S.?

To: *Honorable E. V. Fisher, Motor Vehicle Commissioner,
Tallahassee, Florida:*

Chapter 320, F. S., provides for the registration of motor vehicles including applications by owners and the issuance of licenses and license tags for all such vehicles, that are subject to registration in this state. In this connection the owners are required to make application for the licenses and license tags required and the motor vehicle commissioner issues the said licenses and license tags. There is included a so-called "Florida Automobile Registration Card" a copy of which is furnished the applicant and a copy of which is filed with the motor vehicle commissioner. It is presumed that copies of these instruments are what is retained by the tax collectors in question. Under §320.03, F. S., the county tax collector acts as agent for the motor vehicle commissioner in receiving applications for registration and in issuing the licenses and license tags; under this same section of the statutes the tax collector is required to "keep full and complete records and accounts of all license plates or other properties received by him from the state motor vehicle commissioner..."

Under §320.05, F. S., the motor vehicle commissioner is required to file the application in his office and register the motor vehicle "with the name, residence and business address of the owner...together with the facts stated in such application... which book or index shall be open to the inspection of the public during business hours." These books and records in the office of the state motor vehicle commissioner are public records and within the purview of §119.01, F. S. Where like or similar records are maintained by the tax collectors (as agents of the motor vehicle commissioner), whether under authority of statute or by the consent or permission of the motor vehicle commissioner, they are in the nature of a public record; however, of the motor vehicle commissioner and not of the county.

As the original records in the office of the motor vehicle commissioner are subject to public inspection, we see no reason why the duplicate records maintained for the use and benefit of the tax collectors should not be open to like inspection; so long as such inspection will not unduly interfere with the operation of the tax collector's office generally.

Although the public is entitled to inspect public records such inspection is not absolute and must be exercised with due regard to the operation of the duties of the office and the public generally. The right of a member of the public to inspect books and records in a public office is not paramount to the rights of others who have business to transact with the public official. The public official has the right to adopt reasonable rules and regulation for inspection of public records in order to preserve such records and provide for the transaction of the regular business of the office; however, inspection may not be excluded by such rules. Inspection must take its turn with other legitimate official business. With regard to motor vehicle license and registration records in the hands of county tax collectors, we feel that the motor vehicle commissioner may make reasonable rules and regulations for their inspection by the general public.

The above question is, therefore, answered in the affirmative; subject, however, to the above observations.

STATE OFFICERS AND EMPLOYEES RETIREMENT SYSTEM

May 21, 1953.—053-105.

RETIREMENT SYSTEM—BOARD OF CONTROL— ASSIGNMENT OF RETIREMENT REFUND— §121.13, F. S. APPLICABLE

QUESTION: May the University of Florida, upon written authorization from the employee, deliver to the Campus Federal Credit Union the check covering refund to the employee of the money he withdraws from the Retirement System when he leaves the employment of the state?

To: Board of Control, Florida State University:

Section 121.13, F. S., prohibits the assignment of any benefits derived from the State Officers and Employees Retirement Act. Accordingly, the University may not directly or indirectly, require or accept an assignment of all or any part of a refund paid to a state employee by the Retirement System.

The refund is made by a state warrant payable to the employee and it can be transferred only by his voluntary endorsement. That is the only manner in which his refund can be delivered to the Credit Union.

**STATE OR COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEMS**

August 31, 1953.—053-216.

**STATE LEGISLATURE—SERVICE AS MEMBER—
RETIREMENT BENEFITS—SUSPENSION**

QUESTION: May a retired state or county officer or employee, who becomes a member of the State Legislature, continue to receive retirement benefits during his term of office, or any portion thereof?

To: Honorable C. M. Gay, State Comptroller:

This question depends in large upon a construction of §§121.14 (as to retired state officers and employees) and 134.14 (as to retired county officers and employees) F. S., as amended at the 1953 regular session of the State Legislature. Section 121.14 appears to have been amended by Chapters 28174, 28250 and 28258, Laws of Florida, Acts of 1953, and §134.14 by Ch. 28174, *supra*. Each of these acts was sent to the Governor on June 5, 1953, and became laws, without the Governor's signature, on June 15, 1953, under the Constitution. The last action of the Legislature on Chapters 28174 and 28250 was on June 2, 1953, and on Ch. 28258 was on June 5, 1953.

Under §28, Art. III, of the State Const., each of the acts, being neither approved or vetoed by the Governor, became a law at the same moment so that neither is prior in point of time of becoming a law. Although "an amendatory act which provides that the original statute shall be amended 'so as to read as follows' or otherwise purports to set out in full all that the statute as amended is intended to contain, becomes a substitute for the original" (59 C. J. 925, §527; 50 Am. Jur. 556, §552), so that the several amendments standing separate would appear to be within the rule, we are confronted with the further problem of having each of the enactments become a law at the same time so that no priority as to time exists between them. Furthermore, there appears to be no irreconcilable conflicts between the several amendments so that if they had been separate and independent acts instead of amendments they could have been reconciled and allowed to stand together. Having become laws at the same time, so that neither may be said to be prior in time to the others or either of them, we find no reason why they should not be allowed to stand together as composing the present and existing law.

As expressed in the title, Ch. 28174 was amended "to include day laborers; permit credit for certain services; providing optional retirement benefits; broadening investment of funds; clarifying limitations . . ." Chapter 28250 was to exempt "certain services of physicians from such prohibition (against reemployment) and providing a limitation on such exemption . . ." and Chapter 28258 was to provide for the "suspension of benefits during employment after retirement." Each of said enactments

was designed to accomplish a separate purpose. The amendments of said §121.14 by said Chapters 28174, 28250 and 28258 should be construed and permitted to stand together as a revision of the statute although such revision was accomplished by three separate enactments.

Sections 121.14 and 134.14, F. S., were each amended by Ch. 28258, Laws of Florida, Acts of 1953, each of said amendments purporting to amend the entire section so as to read as therein set out. These amendments merely relate to reemployment "by the State of Florida or any department, branch or agency thereof," as to Section 121.14, and to reemployment "by the State of Florida, or any political subdivision, department, branch or agency thereof"; no reference is made to a retired officer or employee who "receives any other compensation from the State of Florida, or any political subdivision, department, branch or agency thereof for services rendered," as contained in the section prior to amendment. The omission of these provisions from the section as amended appears to go beyond the notice contained in the title of the enactment that it was designed to provide "for suspension of benefits during the employment after retirement." The constitutional regulation and requirements of Section 16, Article III, of the State Constitution applies to amendatory acts as well as to original acts (*McCord v. Connor*, 132 Fla. 56, 180 So. 519; *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693; *State v. City of Jacksonville, Fla.*, 50 So. 2d. 532). "The provisions of an act must correspond with the subject expressed in its title; so nothing can validly be included in the body of a statute which is not expressed in or covered by the title, and all parts of an act which are not within its title are unconstitutional and void, even though the provisions might properly have been included in the act under a broader title." (59 C. J. 811, §393). As the notice in the title was insufficient as a basis for repealing any portion of the section not within said title, serious doubt exists as to the right of the Legislature to repeal matters in the section which were not included in the notice, even by the omission of the same from the statute as amended. We, therefore, feel that the intent and purpose of the Legislature in the enactment of said Chapter 28258 was to insert provisions relating to the "suspension of benefits during employment after retirement" which would otherwise cause a forfeiture of such benefits. This being true the proposed amendments should be considered additions to the existing sections and not as a complete revision of the said section, repealing the provisions of the original section not included therein. Unless the statute is so construed serious doubt exists as to the validity of the amendment because of the limited title under which it was enacted.

Although under prior statutes employment by the state or any of its agencies was prohibited, under §§121.14 and 134.14, F. S., as amended by Ch. 28258, Laws of Florida, Acts of 1953, a retired officer or employee is "prohibited from receiving retirement compensation and salary at the same time." Under §4, Art. III, of the State Const., "the pay of members of the Senate and House of Representatives shall be ten dollars per day for each day of the session" and certain per diem and travel expenses

in addition thereto. It is clear from this constitutional provision that the compensation or salary of a member of the Legislature is payable only during the session and that the member receives no compensation when the Legislature is not in session.

In the light of the above observations, statutes and authorities we feel that a retired state or county officer or employee who becomes a member of the State Legislature may continue to receive retirement benefits during his term of office except that portion thereof when he receives compensation pursuant to §4, Art. III, of the State Constitution.

May 27, 1954.—054-128.

RETIREMENT SYSTEMS—CONTRIBUTIONS— REFUND AFTER DEATH

QUESTION: Who is entitled to State or County officers and Employees Retirement System contributions where officer or employee retires from State or County employment "before accumulating aggregate time of ten years toward retirement" and makes application for refund of such contributions, under either §121.08 or 134.08, F. S., but dies before a refund of such contributions has been made?

To: Honorable C. M. Gay, State Comptroller:

In the instant case the officer or employee pursuant to authority of the statutes named a beneficiary to receive the contributions should he die before retirement. Under the statutes of this State a member of either the State or County Officers and Employees' Retirement System may designate a beneficiary, and change the same at will, to receive a refund of the contributions made by him where he dies before retirement (see §§121.10 and 134.10, F. S.). Under these statutes should any such officer or employee "die" before being eligible to retire under the provisions of this law, the heirs, legatees, beneficiaries or personal representatives of such deceased officer or employee ... shall be entitled to a refund of one hundred per cent, without interest, of the contributions made to the retirement fund...". Any officer or employee retiring from State or County employment with less than ten years service may elect to receive a refund of all contributions made to the retirement system without interest (§§121.08 and 134.08, F. S.; *State v. Gay*, Fla., 41 So. 2d 893).

We are here dealing with a case where a member of one of said retirement systems named a beneficiary under the statute (§§121.10 and 134.10, F. S.) but left public employment before he had accumulated ten years of public service and made application for a refund of the contributions made by him (§§121.08 and 134.08, F. S.) but died after his application for refund had been delivered to the State Comptroller and acted on by him, but before the refund warrant had been delivered pursuant to such application (as a matter of fact the warrant had been issued but not delivered). Such contributions are not subject to "execution or attachment or to any legal process whatsoever and shall be unassignable (§§121.13 and 134.13, F. S.). In effect the question

here posed is whether payment should be made to the beneficiary so named or to the heirs, legatees or personal representative of the decedent. Did the application for refund, by the member in his lifetime, although he died before the refund could be made, have the effect of denying to the beneficiary a refund of such contributions? It must be admitted that refund would have been to the beneficiary had not the member of the retirement system made application for a refund to him personally. Had the warrant been received by the member in his lifetime it would doubtless have passed to his personal representative as an asset of his estate.

Here we are dealing with a matter having many features akin to contract of life insurance where provision is made for naming a beneficiary and for cancellation of the policy by the insured and the receipt by him of the reserve or loan value of the policy. Where an insurance policy provides for the naming of a beneficiary and the changing of the same from time to time, but at the same time provides for the cancellation of the policy at the option of the insured and the payment to him of the cash surrender or reserve value of the same, and the insured, having designated a beneficiary, elects to surrender the policy and receive the cash surrender value thereof, and pursuant to such election files the necessary application with the company, "in such case where the surrender value is not paid before the death of the insured, the estate, and not the beneficiary, becomes entitled to that sum..." (29 Am. Jur. 391, Section 475; see also 45 C. J. S. 543, Section 640; Annotation 91 A. L. R. 1451). In this case the employee elected to receive a refund of the contributions made by him (there is some indication, when §§121.08 and 121.09, and §§134.08 and 134.09, F. S., are read together that positive action on the part of employee is necessary before his contributions are to be left in the retirement fund pending possible future employment, otherwise a refund of the funds should be made to him).

In the light of the above and foregoing information we feel that the application of the employee for a refund of his contributions had the effect of revoking or changing the beneficiary, so that the said contributions should be paid to the estate or personal representative of the said employee. As a precaution it is suggested that the beneficiary named be notified that the State Comptroller, unless prevented by legal process, will at the expiration of thirty days (or such other reasonable time as he may determine) pay the said contributions to the estate or personal representative of the deceased employee.

September 4, 1953.—053-231.

RETIREMENT SYSTEMS—DAY LABORERS

QUESTIONS: 1. May day laborers, recently brought within the purview of the state and county officers employment systems by amendment of the respective statutes, claim credit for services within the statutes rendered prior to the effective date of such amendments and make contributions based on such prior services?

2. If the first above question is answered in the affirmative may contributions for back services be made in installments?

To: Honorable C. M. Gay, State Comptroller:

By amendments to §§121.02 and 134.02, F. S. (Chapters 28174 and 28175, Laws of Florida, Acts of 1953,) day laborers were brought within the purview of the respective state and county officers and employees retirement systems. The titles to these amendatory acts leave no doubt about a legislative intent to extend the said retirement systems to day laborers previously excluded. Each of the amendatory acts became effective on June 15, 1953, without the approval of the Governor, at the same moment.

"Strictly speaking, an amendatory act is not regarded as an independent statute...the statute in its old form is superseded by the statute in its amended form, the amended section of the statute taking the place of the original section, for all intents and purposes as if the amendment had always been there. The amendment should be considered as if embodied in the whole statute of which it became a part. However, in so far as the two acts are the same, the new act is regarded as a mere continuation of the earlier one, and as speaking from the time of the adoption of the original enactment, so that only the new provisions are to be considered as having been enacted at the time of the amendment." (50 Am. Jur. 481, §468; see also 59 C. J. 1096, §647.) "The amendments of sections or parts of sections have the same relation to other portions of the same law as did the sections or parts of sections that were amended (*State v. Gay*, 107 Fla. 73, 144 So. 349, text 353.) The amended sections, for all purposes in the future, became a part of the original statute (*Miami Bridge Company v. Railroad Commissioners*, 155 Fla. 366, 20 So. 2d. 356; *Singleton v. Larson*, Fla., 46 So. 186; *Gay v. Canada Dry Bottling Company*, Fla., 59 So. 2d 788.) The intention of the Legislature must be determined from the entire statute, including the amendment, and not from the amendment alone (*Cragin v. Ocean and Lake Realty Company*, 101 Fla. 1324, 135 So. 795, text 798.)

When first established the retirement systems were elective in that it might be rejected by any officer or employee within six months from and after their effective dates (July 1, 1945) or from and after subsequent employment (Sections 3 and 4, Chapters 22831 and 22938, Laws of Florida, Acts of 1945), however, they were made compulsory as to all officers and employees entering state or county service after July 1, 1947 (§§121.01, 121.04, 134.01 and 134.04, F. S.) Additional time has been given those persons who rejected the systems in the first instance to elect to come under them (§§121.03 and 134.03, F. S.) Those day laborers who are now employed and who were employed on July 1, 1945 (the date of the elective retirement system) and on July 1, 1947 and January 1, 1950 (when rejection might have been withdrawn) and after July 1, 1947 and the amendments (when the retirement system was compulsory) have been brought within the purview of the statute as of July 1, 1953. This raises the question of the rights of those entering employment prior to July 1, 1945, those entering employment between July 1, 1945 and July 1, 1947, and those entering employment between July 1, 1947 and July 1, 1953, the effective date of the amendment. Under these

observations it appears that day laborers would have had the same rights and privileges as other employees had they been originally included in the retirement statutes instead of having been brought in by the 1953 enactment. Strictly speaking all day laborers brought into the statute previously employed would seem to have no right of election as did those originally within the purview of the 1945 act and who were employed between July 1, 1945 and July 1, 1947. The provisions for election under the 1945 enactment has long since expired. The 1945 enactment gave those employees previously employed the right to include previous employment, provided contributions were made for a period of not less than five years.

Under the fourteenth amendment to the federal constitution and the first section of the Declaration of Rights of the State Constitution the state may not deny to any person within its jurisdiction the equal protection of the laws. The constitutional right of "equal protection of the laws" means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation (*Caldwell v. Mann*, Fla., 26 So. 2d 788.) Although it may be that the day laborers form such a class as to permit the Legislature to exclude them from the retirement systems, it is doubted that when they are included they may be treated different from other types of employees. It is our thought that they having been brought within the purview of the retirement acts they must be treated as other types of employees are treated as to their rights under the retirement system. Under the retirement statutes those employed previously to the enactment of the original act were permitted, under stated circumstances, to include prior services within the retirement system. This being true we feel that previous services of day laborers should be included provided contributions from July 1, 1945, if previously employed, or from date of employment if employed after July 1, 1945, are made as would have been required had day laborers been included within the statute from its first enactment. This seems to answer the first question.

There is no express provision as to how the said contributions are to be made by the day laborers coming within the retirement system by virtue of the amendment. It is noted from a reading of §§121.03 and 134.03, F. S., as amended, that provision was made for installment payment by those employees who elected to withdraw their prior rejection of the statutes. Although no such provision is contained in the statutes for installment payments by day laborers, the Legislature has indicated a willingness for installment payments under some circumstances. We, therefore, feel that installment payments, following the pattern suggested by the Legislature as to those withdrawing their previous rejection of the statute, may be permitted, provided, however, unless and until such payments are made no credit for previous service should be given. This seems to answer the second question.

ELECTION TO FILL VACANCIES; TERMS

January 5, 1953.—053-1.

STATE AND COUNTY OFFICERS—BEGINNING AND
TERMINATION OF TERMS OF OFFICE

QUESTION: Where the term of office of public officers "commence on the first Tuesday after the first Monday in January next after their election," at what time of said day does the old term end and the new term begin?

To: *Honorable Bryan Willis, State Auditor:*

Under the terms of the state constitution the office of governor and members of the state cabinet, the justices or judges of most of the several courts, and many other state officers (§§2 and 20, Art. IV, and §§2, 46, 47 and 48, Art. V) as well as most county officers (§14, Art. XVIII) "commence on the first Tuesday after the first Monday in January next after their election." The Circuit Judges elected at the general election in 1948 were, under the state constitution, "to take office on the first Tuesday after the first Monday in January 1949." (§46, Art. V). State attorneys, county solicitors and judges of the criminal courts of record elected in 1948 were, under the state constitution, "to take office the first Tuesday after the first Monday in January 1949" (§47, Art. V). The first term of the judge of the Court of Record for Escambia County elected in 1950 was, under the state constitution, to "begin on the first Tuesday after the first Monday in January 1951" (§48, Art. V). Under the state constitution appointments to fill vacancies in office extend "only to the first Tuesday after the first Monday in January next after the election and qualification of a successor." (§6, Art. XVIII). Under the same constitution elections to fill vacancies in constitutional office are "for that part of the unexpired term *beginning on the first Tuesday after the first Monday in January next after such election*" (§7, Art. XVIII).

It appears to have been the uniform practice in this state, at least since the adoption of the present state constitution, for public officers (the governor being the only apparent exception) to perfect their qualification, including their oath of office, prior to the beginning of their term of office and receive their commission of office under the hand of the outgoing governor. In fact substantially all, if not all, elected public officers who take office on the first Tuesday after the first Monday in January 1953, will have taken their oath of office and furnished bond, as well as received their commission of office, prior to the beginning of said first Tuesday after the first Monday in January 1953. The governor receives no commission of office and by practice is sworn into office on or about noon on said first Tuesday after the first Monday in January next after his election; however, we know of no rule of law that would prevent the governor taking the oath of office at any time after 12:01 on said day. The oath of office taken by the governor is necessary for his qualification; other officers take their oath of office prior to said first Tuesday after the first Monday.

The language used in §§6 and 7, Art. XVIII, of the state constitution may be noted. Appointments under said Section six are *only* to the said first Tuesday after the first Monday, while the term of those elected under Section seven *begin on* said first Tuesday after the first Monday. We feel that the term of office of all state and county officers above mentioned, including that of the governor, begin with the beginning of the first Tuesday after the first Monday; however, the outgoing governor holds over under §3, Art. XVIII, of the state constitution, until the incoming governor takes the oath of office and assumes the duties of the office.

The statutes (§839.14, F. S.) as well as the general laws on the subject (67 C. J. S. 414, §120) require that an outgoing officer turn over the office property to his successor. The following extract from 67 C. J. S. 199-200, §46, might be of assistance, to wit:

"Any elective or appointive officer, properly qualified and serving, is such an officer until removed or the office becomes vacant by operation of law. Where, under a constitutional provision, the official year commences and all offices terminate on a day fixed, strictly speaking, outgoing officers do not pass out of office until the close of such day unless their successors qualify at some time during the day; but such holding-over officers, pending the qualifications of the new officials, are limited in jurisdiction on that day to the closing up of old business and to matters of necessity. All business which naturally belongs to the first day of the official year is within the jurisdiction of the incoming officials, although there may be some delay during the day in qualifying and assuming official duties."

It is our thought that the term "qualification" when used in connection with assuming the duties of public office, includes something more than taking the oath of office, making the required bond and having it approved and receiving the commission of office, but there should be an assumption of the duties of the office, at least in so far as new and additional business is concerned. Where process has been served and other official duties have been performed, by the outgoing sheriff, he would seem to have authority to make return thereof and make such notations thereon as may be required to perfect the duties of the outgoing officer in that connection. No new and additional duties should be performed by the outgoing officer, after the duties of the office have been assumed by the incoming officer, except such as may be necessary to evidence official acts already performed.

We, therefore, feel that the new terms begin with the beginning of the first Tuesday after the first Monday in January and the term of the outgoing officer ends with the ending of the said first Monday unless there is a failure of the incoming officer to assume the duties of his office until later.

CHAPTER XI

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

January 27, 1954.—054-17.

COUNTY COMMISSIONERS—SURPLUS PUBLIC FUNDS— INVESTMENT—REGULATIONS—§125.31, F. S.

QUESTION: May the Board of County Commissioners invest surplus county funds in share accounts of either or both savings and loan and building and loan associations authorized to do business in the State of Florida?

To: Honorable Ed Scott, Clerk Circuit Court, Collier County, Everglades, Florida:

Without passing upon, but assuming its constitutionality, §665.44, F. S., empowers boards of county commissioners, among others, "...having the custody, control, supervision, management or authority to invest any fund or funds...in investment share accounts..." of a Federal savings and loan association doing business in Florida "...and in the shares of any Florida building and loan association, which is a member of the federal home loan bank system." We find that this statute has its origin by the enactment of Ch. 17906, Laws of Florida, 1937.

Subsequently, Ch. 21691, Laws of Florida, 1943, (§125.31, F. S.) was enacted. It empowers boards of county commissioners "...to invest and reinvest any surplus public funds in their control or possession in negotiable direct obligations of, or obligations the principal and interest of which are unconditionally guaranteed by, the United States government at the then prevailing market price for such security."

Chapter 17906, Laws of Florida, 1937 (§665.44, F. S.) empowers the board of county commissioners to invest in investment share accounts of the saving associations designated therein irrespective of any guarantee of their obligations by the federal government. The later act, Ch. 21691, Laws of Florida, 1943 (§125.31, F. S.) authorizes investment only "...in negotiable direct obligations of, or obligations the principal and interest of which are unconditionally guaranteed by the United States government in the prevailing market price for such security." It is possible for a building or savings and loan association to become a member of the Federal Deposit Insurance Corporation, which insures accounts or deposits up to \$10,000. However, I do not feel the shares of these associations are within the purview of §125.31, F. S. They are not the type of obligations con-

templated by the statute for they are neither negotiable nor "such security", contemplated by the section. Paragraph (3) contemplates that the securities be sold by the county when the funds are needed. Shares of the associations are not negotiable.

Until a court of competent jurisdiction says otherwise, I am of the opinion that the county's investment of surplus public funds is limited to those securities within the meaning of said §125.31, F. S.

Hence, the question is answered in the negative.

August 23, 1954.—054-206.

GRAND JURORS—CIVIL ACTION—ATTORNEY— COMPENSATION

QUESTION: Where members of a grand jury are sued in an action of libel resulting from comments and criticisms appearing in their official report relating to the performance of duties by an employee of a county official, may the Board of County Commissioners pay a reasonable attorney's fee incurred by such jurors in the defense of the action?

To: *Honorable Park H. Campbell, County Attorney, Miami, Dade County, Florida:*

The action of libel against these jurors involves the legal rights and liabilities of members of grand juries generally, who represent the people of the State and the County in which they serve. It is to be borne in mind that the jurors do not serve voluntarily but by compulsion of law and at a sacrifice of time and money. Where grand jurors are performing judicial acts in a judicial proceeding, they are immune from a civil liability, *O'Regan v. Schermerhorn* (N. J. 1946), 50 Atl. 2d. 10; *Mundy v. McDonald* (Mich.) 185 N. W. 877. The sanctity of our grand jury system is a matter of vital importance to the people of the State of Florida. Duties and functions performed by members of a grand jury serve a county purpose, as well as a State purpose.

This office is defending two former members of the Legislature and an investigator for a committee appointed by proclamation of the then governor for performance of official duties, who are among the defendants in a civil anti-trust litigation.

Public officers in the performance of their official duties should, so far as possible, be protected against fear of reprisal by way of responding in damages. Members of a grand jury are entitled to some assurance that in the performance of a public service they will not be put to the expense of defending a civil action predicated upon their official acts and report. Therefore, should it be finally determined, in the litigation to which you refer, that the defendants who were members of the grand jury are not civilly liable, I am of the opinion the county may properly pay a reasonable attorney's fee incurred in their defense as such services constitute a county purpose within the meaning of Art. IX, §5, Florida Const. The question, as qualified, is answered in the affirmative.

Such fee can not be paid from funds appropriated by virtue of Ch. 25765, Laws of Florida, 1949. The "Special Grand Jury Fund" created by said law is to be used for investigating crime and enforcing the criminal laws, including the right to employ special legal counsel. The fee may not be paid out of the Fine and Forfeiture Fund, for both §§129.03(3) and 142.01 limit expenditure of monies therein to law enforcement. It appears to me that the fee might be paid only out of any available and unearmarked funds in the general fund.

July 17, 1953.—053-151.

COUNTY EMPLOYEES—VACATIONS—PURCHASES—
CITY COOPERATION—EMPLOYMENT AFTER
RETIREMENT—OKEECHOBEE COUNTY

QUESTIONS: 1. Does the Board of County Commissioners of Okeechobee County have the authority to grant vacations to employees who have been employed by the county for less than six months?

2. Does the Board, under the provisions of Ch. 27249, Laws of Florida, 1951, have the authority to purchase the bulldozer in co-operation with the City of Okeechobee, to be used for the disposal of garbage by the trench method?

3. Can the Board of County Commissioners engage the services of an abstractor who is now retired from county employment for a fee without his being subject to loss of his retirement compensation under the County Officers and Employees Retirement System?

To: Honorable T. W. Conely, County Attorney, Okeechobee County, Okeechobee, Florida:

As to Question One, the general law of Florida in no way provides that the employees of a county shall be entitled to a vacation each year. The accepted custom is for the Board of County Commissioners to grant a certain vacation period, such as two weeks each year, to the employees of the county. We find no objection or legal impediment to the Board granting employees of the county who were employed for less than six months a vacation without pay. As there is no statutory provision in the general law providing what period during the year the person shall be employed by the county in order to be entitled to a vacation with pay to guide us, it is my opinion that it is entirely within the reasonable discretion of the Board as to whether a vacation extended to an employee employed for less than six months shall be granted with pay. The responsibility, however, would be upon the Board to justify the extending of such a vacation if their doing so ever is challenged.

As to Question Two, §2 of Ch. 27249, Laws of Florida, 1951, authorizes the Board to operate incinerators or other garbage disposal plants in cooperation with any incorporated municipality within any such county, and §4 empowers the Board to enter into an agreement with such municipality for the operation of

any incinerator or garbage plant. The trench method of garbage disposal is one of the several ways used by various communities to dispose of their refuse and garbage. The question is whether such a process can be considered operating an incinerator or garbage disposal plant within the meaning of §§2 and 4 of Ch. 27249. The Florida Supreme Court in *Southern Bell Tel. and Tel. Company vs. D-Alemberte*, 39 Fla. 25, 21 So. 570, defined what constitutes a plant as follows: "fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business or any mechanical operation or process." It is my opinion that this definition of a plant as expressed by our Florida Supreme Court is sufficiently broad enough to include the machinery used in the process of disposing garbage by the trench method. Therefore, under the provisions of Ch. 27249, the county may cooperate with the city of Okeechobee in purchasing the bulldozer in question, if it is the intent of the city and county to purchase jointly such machine for the disposition only of garbage. The purchase of such equipment should be made in compliance with pertinent competitive bidding statutes.

As to Question Three, §134.14, F. S. A., prohibits the employment by the State of Florida or any political subdivision, department, branch, or agency thereof, of any person receiving retirement compensation under the provisions of Chapter 134. This section has been amended by Ch. 28258, Laws of Florida, 1953, to read as follows:

"134.14 EMPLOYMENT AFTER RETIREMENT.—

(1) Any person who has accepted and is receiving retirement compensation under this chapter shall have such compensation suspended during any period of re-employment in any capacity whatsoever by the state of Florida, or any political subdivision, department, branch or agency thereof. Any person receiving retirement compensation under this chapter who becomes re-employed by the state or any political subdivision, department, branch or agency thereof, shall furnish timely notice in writing to the agency by which he is becoming employed and to the comptroller of the fact that he is prohibited from receiving retirement compensation and salary at the same time and should he fail to do so, and should he receive and retain both benefits and compensation, he shall forfeit all of the benefits of this chapter forever.

(2) The reemployment by the state of Florida, or any political subdivision, department, branch or agency thereof, of any person who has accepted and is receiving retirement compensation under this chapter shall have no effect on the average final compensation or the aggregate number of years of service of such person, nor shall any deductions for retirement contributions be made from the salary paid such person with respect to such reemployment."

The term "re-employment" as used in the above quoted

amended section must be construed in light of what constitutes employment by the county within the meaning of Ch. 134. Section 134.02, F. S. A., defines what constitutes an officer or employee of the county. This section contemplates an officer or employee as being employed full time by the county at a compensation specified in terms of fixed monthly salary payable from county funds. It is my opinion that should the abstractor referred to in the third question be rendering his professional services publicly for a fee as an independent contractor, and the county should engage his services as such independent contractor, and he would not be an employee within the meaning of §134.02 and therefore would not be re-employed by the county as would deprive him of his retirement benefits under the provisions of §134.14, F. S. A. amended by Ch. 28258, Laws of Florida, 1953. However, if the abstractor should be employed by the county as a full time employee to do abstracting work exclusively for the county at a fixed monthly salary, he would then be a county employee and his retirement compensation would be suspended under the provisions of §134.14 as amended by Ch. 28258, Laws of Florida, 1953, while he was so employed permanently by the county.

August 19, 1953.—053-206.

COMMISSIONERS—STORM WARNINGS BY RADIO
BROADCAST—COUNTY FUNDS NOT ALLOWED
—CH. 252, F. S. APPLIES—MONROE COUNTY

QUESTION: Is the Monroe County Board of Commissioners authorized to expend county funds for the purpose of furnishing its residents and the public in general storm warnings and other weather information by radio broadcast?

To: *Honorable Gerald Saunders, Chairman, Board of County Commissioners, Key West, Monroe County, Florida:*

I find no Florida statute, general or special, which specifically directs or authorizes Monroe county to furnish weather data to its citizens by radio. The Florida Supreme Court has in several decisions determined that the powers and authority of boards of county commissioners cannot be implied but must come within the scope of responsibility and duty established by law. "County commissions can exercise such authority only as is 'prescribed by law,' and where there is doubt as to the existence of authority, it should not be assumed." (*Hopkins v. Special Road & Bridge District No. 4, etc.*, 74 So. 310, Fla.)

It would appear, therefore, that Monroe county does not have the authority contemplated in your question unless such authority is included in the general responsibilities of the county commissions provided in other statutory duties imposed upon them.

I have noted House Bill 938 of the 1953 Legislature to which you called my attention but since the authority created by this act is limited to "advertising," I do not believe that it is applicable to your question. Storm warnings, it seems to me, do not come under the heading of advertising.

I believe, however, that the peculiar geographical and economic features of Monroe county, as pointed out in your letter, do deserve consideration in dealing with this problem.

Monroe county consists of a multitude of islands or keys. Many of these islands are isolated and accessible only by boat or by the Overseas Highway series of bridges and causeways. Monroe county is more than 150 miles in length from the county seat in Key West to the county line and its citizens as well as tourist visitors are scattered throughout the islands which constitute the land area of the county.

A great majority of the civilian citizens of Monroe county are engaged in vocations such as commercial or sports fishing and tourist accommodations which either directly or indirectly are affected by weather conditions to a much greater degree than the average Florida community.

The history of Key West and the surrounding area with regard to weather conditions and natural disasters resulting from hurricanes cannot be ignored in considering the importance to Monroe county residents of adequate and prompt weather information. I believe that it is a matter of record that throughout the past three centuries there has been a greater loss of shipping from natural disasters in the Key West area than any other area on the North American continent. Tragedies such as the Matecumbe hurricane disaster less than 20 years ago in which scores of veterans of World War I perished while doing construction work in the keys emphasize the urgent necessity for prompt action when the conditions threaten that area.

It would appear to me, therefore, that since Monroe county because of its unusual geographic situation is susceptible to aggravated dangers from weather conditions as contracted to other Florida counties, the governing officials of said county are under a unique duty to protect in so far as possible its residents from the hazards of the elements.

Chapter 252, F. S., enacted by the 1951 Legislature was designed to provide a broad authority for the state and its governmental subdivisions, including counties, to furnish an adequate system of protection for its citizens. Section 252.02 (1) provides, in part:

"(1) Because of the existing and increasing possibility of the occurrence of disasters of emergencies of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action or from natural causes, and in order to insure that preparations of this state will be adequate to deal with such disasters or emergencies, and generally to provide for the common defense and to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state, it is hereby found and declared to be necessary

"(a) To create a state civil defense agency, and to

authorize the creation of local organizations for civil defense in the political subdivisions of the state;

“... ”

“(d) to authorize the establishment of such organizations and the taking of such steps as are necessary and appropriate to carry out the provisions of this act.” (Emphasis supplied)

Section 252.09 (1), Florida Statutes, provides, in part:

“Each county of this state is hereby authorized and directed to establish a county civil defense council and organization for civil defense in accordance with the state civil defense plan and program. The members of county civil defense councils shall consist of the county commissioners and such other elective public officials including municipal officials within the county, as may be designated by the county commissioners...”

Section 252.09(2) (a), Florida Statutes, provides:

“(2) Each political subdivision shall have the power and authority:

“(a) To appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes; *provide for the health and safety of persons and property*, including emergency assistance to the victims of any disaster resulting from enemy attack; and to direct and coordinate the development of civil defense plans and programs in accordance with the policies and plans set by the federal and state civil defense agencies.” (Emphasis supplied)

In view of the above quoted provisions of the Florida law, it is my opinion that the Monroe county Board of Commissioners constituting the Monroe County Civil Defense Council, along with other members which they may designate, should properly consider the problem of weather information in the light of the provisions and purposes set forth in Ch. 252, F. S.

It should be noted, however, that Ch. 252, F. S., in creating the state and local civil defense councils contemplates a complete degree of cooperation between the various political subdivisions of the state and the overall state civil defense council. I believe, therefore, that in the event the Monroe county civil defense council should determine that in its opinion the expenditure of county funds appropriated for civil defense purposes may be properly used in order to provide storm warnings or weather information, that such decision should not be acted upon without the full knowledge and approval of the Director of the State Civil Defense Council.

Please advise Mr. Paul E. Sawyer, the Attorney for your Board, that the opinion expressed in my letter to him of July 17, 1953, is modified to the extent that it is in conflict with the views set forth in this opinion.

Subject to the above observations and suggestion, your question is answered in the affirmative.

April 19, 1954.—054-93.

COUNTY FUNDS—DONATION—EXPENDITURE—
OPENING CEREMONY—LOWER TAMPA
BAY BRIDGE

QUESTION: May the Board of County Commissioners of Pinellas County make an outright donation of \$5,000.00 of county funds to a representative committee of citizens, one of whom is a member of the Board of County Commissioners, which committee will plan and conduct the ceremony and celebration in connection with the opening of the lower Tampa Bay bridge, said donated sum to be applied towards defraying the cost of the occasion?

To: *Honorable William C. Cramer, Attorney, Board of County Commissioners, Pinellas County, Clearwater, Florida:*

Undoubtedly, considerable publicity will be given to the importance of the new connecting link between Pinellas and Manatee Counties. A road map of Florida shows that until the present, through traffic up and down the West coast must be routed through the City of Tampa, unless the ferry across Tampa Bay is used. With the opening of the bridge, much vehicular traffic will naturally be channeled through and into Pinellas County.

As we view the situation, the only approach to the problem is to determine whether or not the expenditure can properly be considered advertising or publicity and be authorized by such designation.

It has been consistently held that only by special act of the Legislature is a board of county commissioners authorized to spend county funds for advertising or publicity purposes (A.G.O. 1945-46, page 236; A.G.O. 1947-48, page 152 and A.G.O. 1949-50, pages 169, 180 and 182). You have not directed our attention to a legislative act applicable to Pinellas County, empowering it to levy a special tax for publicity or advertising, so we accordingly assume there is none.

Chapter 20068, Laws of Florida, 1939, creating the Pinellas County Port Authority, has been examined but we do not believe there are any provisions in it which will help us to reach a conclusion on your question.

Certain language in Ch. 29435, Laws of Florida, 1953, should be noted. Said act creates a "Light Industry Council of Pinellas County", for the purpose of attracting light industry. Section 4 thereof reads:

"It shall be the duty of such Council to make a study of the advantages, facilities, resources, products, attractions, attributes, conditions and all other data concerning Pinellas County with relation to the encouragement of

light industry as hereafter defined to locate in said county, to use such means and media as said Council deems advisable to publicize and to make known said data and material to such persons, firms and corporations, agencies and institutions which, in the discretion of said County would reasonably result in encouraging light industry to locate in Pinellas County; to cooperate with any and all other governmental agencies in accomplishing this purpose and to do all other things it deems advisable in its effort to locate a greater amount of light industry in Pinellas County. The encouragement of light industry to locate in Pinellas County is hereby declared to be a valid county and public purpose."

It, therefore, appears that the council appointed under said act might, in its discretion, purchase advertising or publicity where it thought wise for the purpose of attracting light industry.

It is recognized, as was mentioned above, that Pinellas County will receive favorable publicity upon the opening of the bridge. However, the donation of \$5,000 will no doubt be used for purposes other than advertising or publicizing the attractions of Pinellas County for light industry. We have held that where a county is empowered by local act to levy a special tax for advertising or publicity, funds so realized may be spent through the medium of the Chamber of Commerce, provided such monies are used exclusively for publicity of the county (A.G.O., 1949-50, pages 180 and 182). In other words, no part thereof can properly be spent for the general operating expenses of the Chamber of Commerce. Said opinions also point out that it is incumbent upon the board of county commissioners to maintain supervision over the funds so as to be certain that they are spent only for county advertising. Even though we may assume the contemplated donation can properly be made under Ch. 29435, Laws of Florida, 1953, we are immediately confronted with the question of how the funds are to be controlled. We understand that the \$5,000 is an outright gift of county funds, free from all supervision of the board of county commissioners. I, therefore, feel that the earlier opinions control, and the question must be answered in the negative.

October 14, 1953.—053-272.

COUNTY COMMISSIONERS—BOARD MEMBERS —COMPENSATION

QUESTIONS: 1. Where Ch. 28192, §125.161, F. S., 1953 and Ch. 28661, Laws of Florida, 1953, both become law at the same identical time and relate to the salary of members of Boards of County Commissioners, which of said laws governs the salary of the Board of County Commissioners of Sarasota County?

2. Where an earlier legislative act provides for a salary or per diem and in addition, mileage or expense allowance for members of Boards of County Commissioners, does a later legislative act, which fixes solely the per diem or salary and remains silent as to mile-

age or expense allowance, effect the mileage allowance in the earlier legislation?

3. Where an earlier legislative act provides a salary for the chairman of the Board of County Commissioners in an amount greater than the other members of said body would the chairman, upon repeal of said act by Ch. 28192, Laws of Florida, 1953, in addition to the salary therein provided for each county commissioner, also receive the added amount by which his original salary exceeded the salary of the other members of the same Board of County Commissioners?

To: Honorable Bryan Willis, State Auditor:

As to Question One

Chapter 28192, Laws of Florida, 1953 fixes the annual salary of each county commissioner in the several counties of Florida based upon population and is statewide in effect. An examination of the original bill in the office of the Secretary of State reflects that Ch. 28192 passed the House of Representatives on May 22, 1953 and the Senate on May 28, 1953. What is now Ch. 28661, which by §2 fixes the salary of each member of the board of county commissioners in counties having a population of not less than 28,000 nor more than 29,500 according to the last official census, passed the House of Representatives on June 4, 1953 and the Senate on June 5, 1953. Both Ch. 28661 and Ch. 28192, became law without the Governor's signature and were filed in the Secretary of State's office at 11:00 A. M., June 15, 1953. Under Ch. 28192, the salary of each member of boards of county commissioners for a county having the population of Sarasota County is \$3,000 per annum, while by Ch. 28661 that salary is fixed at \$2700 per annum.

It is stated in Sutherland Statutory Construction, 3d Ed. §2020, that acts on the same subject matter enacted at the same session of the legislature create a presumption that both were intended to exist to effectuate the intent of the legislature. In other words, they should, if possible, be construed in *pari materia*. However, when such acts are in irreconcilable conflict, as here, the statute which is the latest enactment will operate to impliedly repeal the prior statute at the same session, to the extent of the conflict in their provisions. See also *Winslow v. Fleischer et al*, 228 P. 101; *State v. Marcus*, 281 P. 454; *State ex rel Kell v. Kremer*, 160 N. E. 60; *Neubauer v. State*, 161 N. E. 826; *Williams v. State*, 223 S. W. 2d 190; which held that an act passed later and going into effect earlier will prevail over one passed earlier and going into effect later. *Sumpter v. Burchett*, 202 S. W. 2d 735; *Campbell County Election Commission v. Weber*, 42 S. W. 2d 511; *Wright v. Broether*, 196 S. W. 2d 82; *Adams County v. Smith*, 23 N. W. 2d 873; *People ex rel Martin v. Oak Park*, 24 N. E. 2d 571; *People ex rel Christensen v. Board of Education Cook County*, 65 N. E. 2d 825; *Gates v. Hickman*, 70 N. E. 2d 441; *State ex rel Shomaker v. Superior Court for King County*, 70 P. 2d 306; *City of Council Grove v. Schmidt*, 127 P. 2d 250.

Section 5 of Ch. 28192 provides that the act shall take effect on October 1, 1953. Since Ch. 28661 has no provision relating to effective date, it, under the Constitution (Art. III, §18) took effect sixty days from June 5, 1953, which is August 4, 1953.

Under the rule of statutory construction above stated, Ch. 28661, governs the salary of members of the Board of County Commissioners of Sarasota County.

As to Question Two

It is elementary that implied repeals are not favored and as to acts pertaining to the same subject matter which may operate in the same field, they are to be read in *pari materia* so that each may remain in full force and effect. Or stated another way, two statutes, which may operate on the same subject without positive inconsistency or repugnancy, should each be given effect, unless a contrary intent appears. *American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524. See also, *Ellis v. City of Winter Haven*, 60 So. 2d 620. It is assumed that there is no legislative intent indicated in the later act to repeal the provisions in the earlier act allowing expenses. Under the usual rule of statutory construction it is possible for both the earlier and later act to operate in the same field in that the later act impliedly repeals the provisions relating to salary and leaves that portion of it pertaining to mileage allowance in full force and effect. Traveling expenses are not considered compensation, 106 A. L. R. 781; 43 Am. Jur., page 154, §368; A. G. O. 1937-1938, page 57.

Therefore, the question is answered in the negative.

As to Question Three

In order to clarify the factual situation, let us assume that under the earlier act, each member of the Board of County Commissioners receives a salary of \$200.00 per month, except the chairman, who receives \$225.00 monthly. The chairman then receives additional compensation of \$25.00 per month. There can be no doubt that the legislature, by passage of Ch. 28192, Laws of Florida, 1953, intended to repeal all local, population or general acts relating to their salary provisions, for §3 thereof reads:

"All laws and parts of laws relating to salaries of County Commissioners in conflict herewith, be, and the same are hereby repealed, but this Act shall not be construed to repeal, affect, or modify the provisions of any law relating to expense allowance to County Commissioners, nor relating to payment of extra compensation to the Chairman of any Board of County Commissioners, nor relating to expenses of County Commissioners incurred on trips outside the county on county business, nor relating to furnishing a car or cars for the use of any Board of County Commissioners, or the members thereof."

It is also significant that the legislature intended to save from repeal or modification, the provisions of any law "...re-

lating to payment of extra compensation to the Chairman of any Board of County Commissioners...". Hence, in order to give effect to this language, we can only reach the conclusion that the chairman of the Board in question, should receive the extra compensation of \$25.00 per month, above that allowed for the other members of his board under the appropriate population bracket.

The question is answered in the affirmative.

For the purpose of this opinion we assume that all legislative acts having any bearing upon the questions are in all respects constitutional, since this office does not undertake to determine the constitutionality of any statute.

June 4, 1953.—053-118.

COUNTY AND CITY OWNED BUILDING—DESTRUCTION
BY FIRE—INSURANCE PROCEEDS MAY BE USED
TO BUILD RECREATIONAL CENTER—§255.01, F. S.

QUESTION: A county and city jointly owned a building which was destroyed by fire. The funds derived from fire insurance carried on the building have been held by the county and city for a period of five years. Under these circumstances, could the city and county use the funds received from fire insurance on the destroyed building to construct a new building on the same site and use said building as a recreational center for the public by leasing it to a non-profit organization to be supervised by the county and city?

To: *Honorable John F. Nicholson, Clerk, Board County Commissioners, Marion County, Ocala, Florida:*

Section 255.01, F. S., provides:

"Proceeds of insurance may be used to replace property destroyed.—when any state, county, municipal, or other public property of this state, is destroyed or partially destroyed, by fire or otherwise, upon which there is insurance, the proceeds of such insurance, when collected, may be used by the officer having the supervision of the property destroyed, for the purpose of construction to replace such property, or for the repair thereof."

I believe this statute provides an affirmative answer to the first part of your question. That is to say, assuming the county and city have preserved the funds intact which were received from fire insurance on the destroyed building, the said county and city are authorized by §255.01 to use said funds in constructing another building.

Chapter 418, F. S., provides broad authority for counties and cities to establish recreation centers and playgrounds either separately or as joint enterprises. The method established by said chapter for the creation and operation of such playgrounds and recreation centers is fluid, indicating on the part of the

Legislature a desire to delegate to the counties and cities powers for this purpose which are in general more extensive and flexible than is ordinarily the case when special authority is granted for specific purposes.

Section 418.02 of this chapter provides:

"Recreation centers; use and acquisition of land; equipment and maintenance.—The governing body of any such municipality or county may dedicate and set apart for use as playgrounds and recreation centers and other recreation purposes, any lands or buildings, or both, owned or leased by such municipality or county and not dedicated or devoted to another or inconsistent public use; and such municipality or county, may, in such manner as may now or hereafter be authorized or provided by law for the acquisition of lands or buildings for public purposes by such municipality or county, acquire or lease lands or buildings, or both, within or beyond the corporate limits of such municipality or county, for playgrounds, recreation centers and other recreational purposes and when the governing body of the municipality or county so dedicates, sets apart, acquires or leases lands or buildings for such purposes, it may, on its own initiative, provide for their conduct, equipment, and maintenance according to provisions of this chapter, by making an appropriation from the general municipal or county funds." (Emphasis supplied.)

With regard to that portion of your question which relates to the authority of the governing body of the proposed recreation center to lease said facilities to a non-profit organization to be operated under the control and supervision of the county and city, I can see no reason why a suitable arrangement could not be worked out between the governing body and the non-profit organization for the use of the building for public entertainment and recreation sponsored by the organization in question on a rental basis limited to mutually satisfactory purposes and specifically designating the time when the building was to be used.

In a similar question considered in Attorney General's Opinion No. 049-468 issued on October 3, 1949, I stated:

"It is my opinion that your Board of County Commissioners has the power to lease these buildings and other real property acquired by it to private individuals or governmental agencies if it is determined by your Board that they are not needed for any county purpose. Section 125.35, F. S., 1941, Cumulative Supplement, authorizes sales of real and personal property by County Commissioners. It is my understanding that the rule is that the power to sell implies the power to dispose of lesser interests in land, including the making of leases.

"I believe that rentals of such realty on a month-to-month or other short term basis could be legally negotiated by the County Commissioners without advertising

for competitive bids. But, leases on a longer basis, such as, for example, two or more years, which would in effect postpone for a considerable length of time the power of the County to use such property or to sell the property outright, should in my opinion be effected only by advertisement and competitive bids, in the same manner as a sale of realty, as provided by §§125.35, 125.36, and 125.37, inclusive, F. S., 1941, Cumulative Supplement."

February 23, 1953.—053-39.

COUNTY COMMISSIONERS—AUTHORITY—PERMIT
INSTALLATION—PUBLIC TOLL TELEPHONE
—COURTHOUSE—LEON COUNTY

QUESTION: Is the Board of County Commissioners of Leon County authorized to permit the installation of a public toll telephone in the county courthouse building for the use and convenience of the public?

To: *Honorable J. Lewis Hall, County Attorney, Leon County, Tallahassee, Florida:*

As you point out, the telephone company will likely realize a profit from the tolls exacted for the use of the telephone, and is thereby technically engaging in business within a county building. County buildings, of course, may not be used for the purpose of operating a private business enterprise but are dedicated solely for the use of public business. However, it is recognized that the demands of the public for the use of the present telephone facilities in the various county offices in the courthouse may be such as interfere with the transaction of the county business. In other words, the telephones installed in the various county offices should be used for the transaction of county business, and not unduly interfered with by persons who request permission to use such lines for the transaction of other than county business.

We feel common sense demands that if the Board of County Commissioners, in its judgment, determines that the business of the county is presently being impaired, it may, without expense to the county, have provided for the use of the public such telephone facilities as may be necessary to relieve the demand upon the telephone lines installed in the county offices. Of course, the telephones must be installed so as not to interfere with the use of the building.

Section 409.272, F. S., 1951 grants authority to the Board of County Commissioners to permit the operation of vending stands by "needy blind persons or automatic vending machines by the Florida Council for the Blind for the benefit of needy blind persons ..." I do not believe that the statute would of necessity exclude the installation of a public toll telephone where such would be justified under the circumstances.

The question, within the limitations set out above, is answered in the affirmative.

February 10, 1953.—053-30.

COMPETITIVE BIDS—"ESCALATOR" OR "POSTED
MARKET PRICE" CLAUSES—§125.08, F. S.
—DADE COUNTY

QUESTION: May Dade County, under §125.08, F. S., 1951, accept a bid for supplying it with petroleum products, which is not a firm bid but one having attached thereto an "escalator" or "posted market price" clause, thereby becoming subject to an increase or decrease in the market price of the products upon the dates of actual delivery?

To: *Honorable Park H. Campbell, County Attorney, Dade County, Miami, Florida:*

While we are informed there is a distinction to be drawn between a true "escalator" clause and a "posted market price" clause, that point will not be labored in view of the conclusion reached. The answer turns upon whether or not the Board may, under §125.08, F. S., 1951, accept other than a firm bid.

Section 125.08, F. S., 1951, prohibits the purchase by a board of county commissioners of a county having more than 39,000 population of "any goods, supplies or materials for county purposes," when the amount paid therefor exceeds \$1,000, until after advertisement for and receipt of competitive bids. The statute requires the acceptance of the bid of the "lowest responsible bidder" unless all bids are rejected. Does the competitive bidding statute contemplate an arrangement whereby the amount paid by the county fluctuates and is determined at some future date now uncertain, by the then market price of the commodity? One of the basic purposes for competitive bidding is that the political subdivision concerned may be able to determine with finality the extent of its financial obligation required for the purchase of goods or products.

We recognize that a contract between private individuals or firms containing "escalator" or "posted market price" clauses may be binding, as well as desirable in this age of a highly inflated economy, particularly where the contract extends over a considerable period of time. However, we are here concerned with the expenditure of public funds and confined by statutes as construed by court decision, relating to how they may be properly expended. Definiteness in the amount of the bid and the contract price is an essential requirement of the competitive bidding statute.

County commissioners have no powers except those expressly vested in them or those that must be necessarily implied to carry into effect powers expressly granted them. *Crandon vs. Hazlett*, 157 Fla. 574, 26 So. 2d 638; *Gessner vs. Bel-Air Corporation*, 154 Fla. 829, 17 So. 2d 522.

Consequently, I am not in a position to advise that the Board is authorized to accept bids and enter into contracts which contain "escalator" or "posted market price" clauses. The question is accordingly, answered in the negative.

Should you determine that such provisions will be to the advantage of the county, resulting in a saving to taxpayers, I can only suggest that it might be well for you to institute an appropriate proceeding to determine the question with finality.

January 22, 1953.—053-13.

COUNTY COMMISSIONER'S DUTY—AID TO INDIGENT
PROPERTY OWNERS—§125.01(4), F. S.—
OSCEOLA COUNTY

QUESTIONS: 1. Does the Board of County Commissioners of Osceola County under the Constitution and Statutes of Florida, have the right in the exercise of their own judgment to grant aid to an indigent person although such person should own property?

2. Does the County Commissioners have the lawful right to take a lien upon real property of a person determined by the Board to be indigent and pay off a first mortgage on such property in order to protect its interests if the county should acquire title to the property?

To: *Honorable Lawrence Rogers, County Attorney, Osceola County, Kissimmee, Florida:*

Section 125.01(4), Florida Statutes, 1951, imposes upon the counties the duty "to care and provide for the poor and indigent people of the county." Article 13, Section 3, of the Florida Constitution reads in part as follows:

"The respective counties of this state shall provide in the manner prescribed by law for those of the inhabitants who by reason of age, infirmity or misfortune may have claims upon the aid and sympathy of society."

The Constitution or the Statutes of Florida neither permit nor prohibit the county to grant aid to persons who claim to be indigent and who own real or personal property. The law grants to the Board of County Commissioners the sound discretion to determine the matter of properly administering the duty of providing for the indigent of the county. There is no defined standard established in the law to measure what constitutes an indigent person and the responsibility is with the Board to ascertain what persons are indigent within the county from the circumstances surrounding each particular case. The mere ownership of property in itself, either personal or real, will not prevent persons from being classified indigent if such persons are destitute and helpless as a result of causes such as age, deformity or other infirmities, and are without income or means to support themselves, 70 C. J. S., Paupers, Section 69, Page 8, and 41 Am. Jur., Poor and Poor Law, §19, Page 694.

In your letter you had reference to the ownership of a home by a person who claims to be indigent. It is my opinion that the Board of County Commissioners may grant assistance to a person who is otherwise determined to be indigent by the Board who owns a home of small value which perhaps has been used for a

homestead over a period of years. But, however, it is my further opinion that a person should not be classified as being indigent and entitled to aid from the county if such person should own a home of great value that could be sold and the proceeds could be used for his maintenance and support.

It is recognized at common law that as a general rule a pauper or his estate is under no obligation to reimburse the public authorities for support furnished in absence of statute, fraud or contract, 70 C. J. S., Paupers, §64, Page 129. There is no constitutional or statutory provision in Florida that places an obligation upon an indigent person to repay the county for the aid given to him if he should become financially capable to do so at a later date. Therefore, it is my opinion in the absence of fraud or contract, an indigent person being under no duty to repay the county for aid granted, if he should become financially able, the County Commissioners would not have a right under the law to take a lien on any personal or real property of a person who is otherwise determined to be indigent and in need of financial assistance.

July 9, 1954.—054-160.

COUNTY EMPLOYMENT—PERSONNEL—OFFICE OF
COUNTY TAX ASSESSOR—MONROE COUNTY

QUESTION: May the Board of County Commissioners of a county employ and pay from county funds one or more personnel to be under the supervision and to assist the tax assessor in the operation of his office?

To: *Hon. C. M. Gay, State Comptroller:*

Boards of county commissioners in this state "have no powers other than those expressly vested in them by statute, or that must be necessarily implied to carry into effect the powers thus expressly vested . . ." (*Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638, text 642). We find no express statutory power in boards of county commissioners in this state to employ and pay from county funds assistants for the county tax assessor (see Ch. 125, F. S., and other statutes and laws applicable to boards of county commissioners), other than assistant assessors of taxes (§7, Art. VIII, state const.); however the compensation of such assistants is payable from the income of the office of the tax assessor (§193.18, F. S.). County tax assessors are required to submit their office budgets to the State Comptroller on or before July first of each year (§193.02, F. S.). Chapter 145, F. S., contemplates that the costs and expenses of the operation of county offices, including the office of the tax assessor, be paid from the income of the said office and not from county general funds; unless and except where otherwise expressly provided by the legislature.

The above question should be answered in the negative in the absence of an act (special, population or otherwise) of the legislature expressly providing otherwise. We know of no such enactment applicable to Monroe county, Florida.

July 12, 1954.—054-166.

COUNTY SCHOOL NURSE—EXPENSES—
COUNTY CONTRIBUTION

QUESTION: Is the Board of County Commissioners of St. Johns County empowered to make a contribution of county funds in the sum of \$1,000 towards the expense of employment of a county school nurse?

To: *Honorable Hiram Faver, Clerk of Circuit Court, St. Johns County, St. Augustine, Florida:*

Inasmuch as you did not call our attention to any special act of the Legislature touching upon your question, we assume there is none.

The school code contemplates that the boards of public instruction within the state shall employ health assistants, including nurses [§§231.01 (4) and 231.34, F. S.]. The county board and county health units are required to cooperate in providing physical examinations of pupils (§232.32, F. S.). Section 232.29, F. S. requires that periodic physical examinations be given children attending the public schools of the state.

In Opinion 049-446, we held that a county might not expend county funds for the purpose of building a grandstand at an athletic field owned by the school, inasmuch as the same would not serve a county purpose. My immediate predecessor in office held that a board of county commissioners was not authorized to expend public funds for medical expenses of a deputy sheriff wounded in line of duty while attempting to arrest a felon (Biennial Report of Attorney General 1947-48, page 141).

I find no statutory authority empowering the Board of County Commissioners to contribute to the expenses of the school nurse, an employee of the school board. As you are aware, a special levy is permitted by §154.02, F. S., for county health units. County commissioners have only those powers expressly granted by statute or those which must be necessarily implied in order to carry out authority granted by statute (*Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638; *Gessner v. Del-Air Corporation*, 154 Fla. 829, 17 So. 2d 522).

It follows that the question is properly answered in the negative.

Enclosed is a copy of Opinion 052-305, dated November 5, 1952, which holds that a county board of public instruction may enter into a contract with a county health unit to assist the unit in the performance of its function by providing health services in the public schools. This may be of assistance to you in your problem.

COUNTY ANNUAL BUDGET

July 7, 1953.—053-142.

PINELLAS COUNTY BUDGET COMMISSION—POWERS AND DUTIES—CH. 14678, ACTS 1931 APPLICABLE

QUESTIONS: 1. What are the general duties and responsibilities of the Pinellas County Budget Commission under §9 of Ch. 14678, Laws of Florida, 1931?

2. Does the Budget Commission have power to reduce the amount in a budget submitted to it?

3. May the Budget Commission entirely disallow an item set up in a budget, without regard to necessity or authority by which such item was included in the budget submitted?

To: *Honorable Thomas L. Smith, Chairman, County Budget Commission, Pinellas County, Clearwater, Florida:*

As to question one, the Florida Supreme Court, in the case of Budget Commission of Pinellas County v. Blocker, 60 So. 2d 193, in declaring Ch. 26465, Laws of 1949, Extraordinary Session, unconstitutional, held that Ch. 14678, Laws of Florida, 1931, is applicable to the Pinellas County Budget Commission. Section 9 of Chapter 14678, Laws of Florida, 1931, provides in part as follows:

"The County Budget Commission is hereby authorized and empowered to change, alter, amend, increase, or decrease any item and total amount or amounts of any estimate of expenditures or receipts prepared or submitted by any board pursuant to this act, and to fix, determine and adopt a budget of all receipts and all expenditures for every such board."

Under this quoted part of §9, the Budget Commission has the authority to increase or decrease any item or total amount in any budget submitted by any board as defined in Ch. 14678 and required to submit a budget to the commission by the act. The Budget Commission has the authority to adopt a budget of all receipts and expenditures for each board within the purview of the act. Section 9 provides further, in part, as follows:

"The County Budget Commission may also fix and determine the amount to be paid or allowed by the county during the ensuing fiscal year by or for each and every county officer for salaries of employees and deputies and for supplies and other expenses of the conduct of his office. Every such budget so adopted by the County Budget Commission for each such board shall be final and shall have the force and effect of fixed appropriations determined by the authority of law which shall not be altered, amended or exceeded in whole or in part by any such board or officer or member thereof."

The Florida Supreme Court, in interpreting the above quoted

portion of §9 of Ch. 14678, has ruled in *Cary v. State*, 148 Fla. 679, 190 So. 49, that this "quoted provision of chapter 14678 does not attempt or purport to authorize the Budget Commission to fix the salaries or the compensation to be paid employees and deputies of county officers, but its purport is to authorize the Budget Commission to fix and determine the gross amount to be paid or allowed by the county during the ensuing fiscal year by or for every county officer for the operation and conduct of his office, including salaries of employees and deputies, and for supplies and other expenses."

In continuing, the court said further, "In *Sparkman v. County Budget Commission*, 103 Fla. 242, 137 So. 809, 813, we had this same provision under consideration and held:

"The statute in this case does not authorize the budget commission to fix the compensation of the officer; that is done by statute. Nor does the statute authorize the budget commission to fix the number or qualifications of employees or the character of other expenses. The statute does not authorize a board to 'fix the number and compensation of deputies, clerks, or assistants' "...

The Budget Commission, following the decision in the *Cary* case, has the authority to decrease an item in the budget submitted by the County Commissioners or other county officials required by Ch. 14678 to submit an estimate of expenditures and receipts. But, however, the Budget Commission may not break down such lump sum estimate so as to specify what amount shall be paid to an individual employee or how office expenses shall be allocated. Nor does the Budget Commission have the authority to determine a county officer's salary that is fixed by statute. This answers your first question.

As to questions two and three, as indicated in our discussion of the first question, the Budget Commission may reduce or raise an item which is submitted to it by a board or the officer concerned. However, we are enclosing copy of Opinion 051-330, which touches upon the powers and authority of the County Budget Commission. You will note reference therein of the *State ex rel. Kenny et al., Florida Board of Forestry and Parks vs. Davis et al.*, 154 Fla. 893, 19 So. 2d. 373. It seems to us that certain language of the Supreme Court in this case specifically outlines the limitations upon the County Budget Commission, where at page 374 it is said:

"(1) County budget commissions are primarily fiscal in purpose and partake but little if at all of the policy making aspect. They are of late arrival in our scheme of government and grow out of the complex situation in which governmental integers (national, state, county, and local) found themselves from having taken over so many public services in addition to the duty of governing. The raising and distribution of revenue for all these purposes is where the work of the budget commission comes in. It may raise or lower estimates of the different boards and in other respects reconcile their fiscal affairs. We find nothing in the law which authorizes the county budget commission to ques-

tion the policy of the legislature in adding to or taking from the duties of a county board or to thwart the means for the execution of their duties. If it can assume such a role, then it becomes superior to its creator and assays unto itself prerogatives never vested in it. *Fuller v. State ex rel. O'Donnell, Fla., 17 So. 2d. 607.*"

Therefore, to specifically answer your questions two and three, once the determination has been made by a board for the inclusion of a particular item based upon lawful authority, the County Budget Commission may not reverse that board but then may only consider the fiscal aspects of the expenditure.

April 13, 1953.—053-80.

COUNTY ANNUAL BUDGET—AMENDMENT— UNANTICIPATED—FUNDS

QUESTION: Where, after adoption of the annual budget, un-anticipated funds are received from race track receipts, collection of ad valorem taxes and the sale of county lands, may the Board of County Commissioners thereafter amend its budget so that such additional income may be properly budgeted and expended during the current fiscal year?

To: *Honorable Thomas W. Shands, Attorney, Board of County Commissioners, Fort Myers, Florida:*

Section 129.06, F. S., 1951, provides that upon the final adoption of the budget, the itemized estimates of expenditures have the effect of fixed appropriations and shall not be amended or altered, except as provided in Ch. 129. This same section authorizes the Board to amend the budget for, among other things:

"A receipt of a nature from a *source not anticipated in the budget* and received for a particular purpose, including but not limited to grants, donations, gifts, or reimbursement for damages, may, by resolution of the board spread on its minutes, be appropriated and expended for that purpose, in addition to the appropriations and expenditures provided for in the budget. Such receipts and appropriations shall be added to the budget of the proper funds".
(Emphasis supplied)

This seems to be authority for the board, under the circumstances set forth in the question, to amend its budget and thereby expend the unanticipated sums received.

Opinion 051-434, dated November 29, 1951, copy of which is enclosed, sets out what we believe to be the proper method of amending the budget, and we call particular attention to the last paragraph.

July 15, 1954.—054-172.

PROPERTY—COUNTY WIDE APPRAISAL—EXPENSES— COUNTY FUNDS—SPECIAL ACCOUNT— CH. 129, F. S., APPLICABLE

QUESTION: May taxes be assessed and an account created, in

addition to those provided for in §193.32, F. S. for causing an appraisal of all property in the county to be made and paid for pursuant to §193.111, F. S.?

To: Hon. Arthur W. Newell, Clerk Circuit Court, County Court House, Orlando, Florida:

Section 193.32, F. S., provides for the levy and collection of a tax for a general fund, fine and forfeiture fund, general road and bridge fund, general county school fund, agriculture and livestock fund and an outstanding indebtedness fund; however, the establishment of such funds may not be construed to "prohibit the levy of reasonable taxes for such other county purposes as are specifically authorized by law." This section originated not later than 1941.

Section 193.111, F. S., provides for the appraisal (evidently for tax assessment purposes) of all property within a county, at the discretion of the Board of County Commissioners and the expenditure of county funds for such purpose is declared to be a county purpose. Such expenses may be paid "from any funds of said county" and taxes may be levied "for the purpose of securing funds to secure such appraisalment." A copy of this appraisal is required to be deposited with the County Tax Assessor. This section originated in 1951.

Said §193.32, although it mentions the county general fund, does not limit such county general fund to the eight mills tax therein mentioned and should be read with Ch. 129.02, F. S., the county "general fund" contains not only the eight mills tax mentioned in §193.32 but includes any other "taxes now or hereafter authorized by law to be levied for county wide purposes."

Although §193.111 authorizes the payment of appraisal expenses from any existing fund of the county it also recognizes that in some instances no existing county fund will be sufficient for such purpose in which case the "county may levy taxes for the purpose of securing funds to secure such appraisalment," which clearly appears to be a special tax levy for the specific purpose of making the appraisal. Any such special taxes levied under §193.111 would be "taxes now or hereafter authorized by law to be levied for county wide purposes" which would become a special account in the county general fund under Ch. 129, F. S. Although the receipts from such a tax would be payable into the county general fund a special account within such general fund would be required in order to preserve the said tax fund for purposes of making the appraisal.

The above stated question is answered in the affirmative; subject, however, to the above mentioned limitations upon the maintaining of the county funds and accounts under Ch. 129, F. S.

COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEMS

December 9, 1953.—053-323.

RETIREMENT SYSTEMS—SPECIAL COUNTY SYSTEM— OMITTED OFFICERS AND EMPLOYEES—ELIGIBILITY

QUESTION: Where a special county retirement system for county officers and employees omits from its operation certain county officers or employees, may such omitted officers and employees elect to come within the retirement system provided for in Ch. 134, F. S.?

To: Honorable C. M. Gay, State Comptroller:

It is provided in §134.04, F. S., that "this law *shall not be compulsory* as to any officer or employee of any county *having* a county retirement system, and provided, further, however, that no officer or employee of a county having a retirement system *shall participate in both* the retirement system herein provided and also in such county retirement system." The sum and substance of the above quoted provision of said §134.04, F. S., is that Ch. 134, F. S., is not to be compulsory as to county officers and employees of a county having a special retirement system, even though such special retirement system be permissive and not compulsory (see opinion of March 30, 1953, 053-70), or there be county officers or employees not within the purview of the said special county retirement system.

Although the statute expressly states that Ch. 134, F. S., is not compulsory where there exists a special county retirement system, there is nothing in said chapter that expressly prohibits a county officer or employee not under the special county system from voluntarily becoming a member of the system set up by said Ch. 134. It is further noted that although said §134.04 prohibits a person from receiving retirement pay from both systems, there is no express provision in said Ch. 134 prohibiting an officer or employee of a county having a special retirement system from belonging to the system under Ch. 134 when not under the said special county system. Unless the officers and employees of such county having a special retirement system, but which officers and employees are not within the purview of such special system, are permitted to enter the system under Ch. 134, they are without a retirement system. The fact that a retirement system is not made compulsory is no proof that such system is closed to, or is not permissive to, a class of officers and employees not within the purview of the special county system. Ch. 134 being remedial in its nature should be liberally construed.

We, therefore, feel that the above question should be answered in the affirmative.

November 4, 1953.—053-300.

RETIREMENT SYSTEM—CERTAIN LABORERS OF A COUNTY—INCLUSION

QUESTION: Where a county officer, board or agency has cer-

tain laborers on a stand by basis for employment from time to time on a day to day basis and not on a month to month basis, and who are paid upon an hourly basis for work done by them, are such persons county "officers and employees" and within the purview of Ch. 134, F. S., as amended?

To: *Honorable C. M. Gay, State Comptroller:*

The above question arises by reason of the county board of public instruction of one of the counties of this state having enrolled certain laborers on its maintenance crew and who work and are paid on an hourly basis. These men work on a day to day and not on a month to month basis. If the occasion arises when the board has no work for them they are not for such time employees of the board. When a new project begins generally such laborers are put back to work.

Under §134.02, F. S., as amended by Ch. 28175, Laws of Florida, Acts of 1953, county officers and employees within the purview of said statute include all *full time* officers or employees who receive compensation for services rendered . . . provided that such compensation . . . shall be *specified in terms of fixed monthly salary* . . . Prior to the 1953 amendment county officers and employees included "all full time officers or employees, except day laborers, who receive compensation for services rendered... provided that such compensation . . . shall be specified in terms of fixed monthly salary"

Under the circumstances set out in the request for opinion, and in your file handed us with the said request, we doubt that the employees in question may be said to be "full time officers or employees whose compensation is specified in terms of fixed monthly salary" so as to be within the purview of the said county officers and employees retirement system. The above question is answered in the negative.

July 31, 1953.—053-178.

COUNTY RETIREMENT SYSTEM—COMPENSATION—
EMPLOYMENT BY SHERIFFS PROHIBITED—
§134.14, F. S.

QUESTION: May a person who has retired under the County Officers and Employees Retirement System (Ch. 134, F. S.) perform services for compensation for one or more of the sheriffs of this State, without affecting his retirement status?

To: *Honorable John A. Madigan, Jr., Attorney for the Sheriffs' Association, Tallahassee:*

Under §134.14, F. S., "any person accepting or receiving retirement compensation under this chapter shall not be employed in any capacity by the State of Florida or any political subdivision, department, branch or agency thereof and any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts such employment or receives any other compensation from the State of Florida or any political subdivision,

department, branch or agency thereof *for services rendered shall forfeit all the benefits of this chapter forever . . .*" The above statute in substance, and in so far as here material, provides that any person accepting or receiving retirement compensation under Ch. 134, F. S., *who accepts employment in any capacity from a political subdivision of the State or who receives compensation from a political subdivision for services rendered shall forfeit all his retirement benefits forever.*

In comparing §121.14, F. S., (State Officers and Employees Retirement System) with said Section 134.14, F. S., (County Officers and Employees Retirement System) it is noted that employment by, or receipt of compensation for services from, "the State of Florida or any department, branch or agency thereof" is prohibited and no mention is made in said Section 121.14 of being employed by or receiving compensation for services from "political subdivisions." For this reason it is thought that the opinion of this office to Honorable C. M. Gay, State Comptroller, under date of July 29, 1949 (049-349), and the subsequent judgment of the Circuit Court in and for Leon County, Florida, upon the same subject, can be of little assistance in deciding the above stated question. Counties have been said to be political subdivisions of the state (*Keggin v. Hillsborough County*, 71 Fla. 356, 71 So. 372; 20 C. J. S. 754, Section 1, Note 5), legal political division (*Whitney v. Hillsborough County*, 99 Fla. 628, 127 So. 486) and subdivisions of the State (*Masters v. Duval County*, 114 Fla. 205, 154 So. 172). Employees of a sheriff in this State appear to be clearly within the purview and intention of §134.02, F. S., as amended by Chapter 28175, Laws of Florida, Acts of 1953, as well as said section prior to said amendment. Employment of such a retired person by any of the sheriffs of this State would clearly be within the purview of said §134.14, F. S.

We come now to a consideration of the application of said §134.14, F. S., to compensation paid by a sheriff's office to a person retired under said Ch. 134, F. S., "for services rendered" that office under a contract other than one of employment. It seems evident from said §134.14 that the Legislature not only intended to prohibit the re-employment of a retired county officer or employee by the State, any county, or state department, branch or agency. The sheriff and his deputies and employees appear to be within the purview of said Ch. 134. The terms of the statute not only prohibit a retired county employee from accepting further county employment but also prohibit his receiving compensation from the county for services rendered. The income of the sheriff's office, at least over and above his own salary, partakes of the nature of county funds (*Ch. 145, F. S., Sparkman v. County Budget Commission*, 103 Fla. 242, 137 So. 809, text 812; *Martin v. Karel*, 106 Fla. 363, 143 So. 317, text 321) and before such funds may be used by the sheriff they must be budgeted and expended as budgeted (*Ch. 129, F. S.*). The payment of salaries of deputies and employees, as well as compensation for contract services, by a sheriff from the income of his office would, therefore, be the payment of county funds or in the nature of the payment of county funds. If any of such funds

were paid for contract services performed for the sheriff by a retired county employee it would doubtless be *compensation for services rendered* to a county. Compensation for *services rendered* does not include compensation for goods, wares, merchandise and other things of value sold to a county, such as the furnishing of abstracts for a consideration (053-151).

Until the above question is judicially determined on a petition for declaratory judgment or decree or other proper proceedings we feel that the above question should be answered in the negative.

March 30, 1953.—053-70.

COUNTY OFFICERS AND EMPLOYEES RETIREMENT
SYSTEMS—SPECIAL COUNTY SYSTEM—
EFFECT OF STATE SYSTEM

QUESTION: In the light of the provisions of §134.04, F. S., where there is a special retirement system in any county for its officers and employees, are any officers or employees of such county who are not under the said county retirement system required to become members of the State County Officers and Employees Retirement System?

To: Honorable C. M. Gay, State Comptroller:

Section 134.04, F. S. in so far as here material, provides that "the provisions of this law shall be compulsory as to all persons who enter the employment of any of the counties of the State of Florida on or after July 1, 1947 . . . provided, however, that *this law shall not be compulsory as to any officer or employee of any county having a county retirement system*, and provided, further, however, that no officer or employee of a county having such a retirement system shall participate in both the retirement system herein provided and also in such county retirement system." The above provisos were inserted for the first time in the 1947 amendment of §134.04, F. S. From the very nature of the question it must be presumed that the special retirement system in question contains no provision for compulsory membership. It is clearly stated in the above quotation that no member of the County Retirement System may also become a member of the system provided by Ch. 134, F. S.

The answer to the above question seems to be tied up in the underlined provision in the above quotation from §134.04, F. S. Was it the intention of the Legislature that such underlined language exempt from the compulsory provisions of §134.04, F. S., those persons who are members of the County Retirement System, or does it exempt officers and employees of counties having a separate county officers and employees retirement system? The statute reads "that this law shall not be compulsory as to any officer or employee of *any county having a county retirement system*"; it does not read that this law shall not be compulsory as to any officer or employee *belonging to a special county retirement system*. Why did the Legislature make reference to

officers and employees of *any county* having a county retirement system, instead of officers and employees *belonging to* a county retirement system, if it intended to make Ch. 134, F. S., compulsory as to such county employees who are not members of the county system? Unless the language used by the Legislature is subject to more than one meaning then rules of construction are not applicable (*State v. King*, 137 Fla. 190, 188 So. 122; *State v. Burnett*, 141 Fla. 870, 194 So. 277; *Richardson v. City of Miami*, 144 Fla. 294, 198 So. 51).

It has been stated that "the natural and appropriate office of a proviso is to create a condition precedent, to except something from the enacting clause, to limit, restrict or qualify the statute in whole or in part, or to exclude from the scope of the statute that which otherwise would be within its terms. A proviso, however, is not always so used." (50 Am. Jur. 457, Section 436). In the light of these observations let us note the following extract from the statute, to wit, "the provisions of this law shall be compulsory as to all persons who enter the employment of any of the counties of the State of Florida on or after July 1, 1947 . . . provided, however, that this law shall not be compulsory as to any officer or employee of *any county having a county retirement system . . .*" We fear that it would be a strained construction to hold that the exemption is to those persons who are members of the County Retirement System instead of those persons who are employed by a county having a retirement system.

We, therefore, in the light of the above observations, answer the above stated question in the negative.

March 16, 1953.—053-64.

JUSTICES OF PEACE—OFFICE—CLERKS AND
SECRETARIES — RETIREMENT SYSTEM—
ELIGIBILITY—CH. 134, F. S.

QUESTION: Does a clerk or secretary employed by a Justice of the Peace, in connection with the operation of his office, come within the purview of the County Officers and Employees Retirement System, or Ch. 134, F. S.?

To: Honorable C. M. Gay, State Comptroller:

County officers and employees, within the purview of said County Officers and Employees Retirement System, include "all full time officers or employees, except day laborers, who receive compensation for service rendered from county funds or who receive compensation for employment or service from any agency, branch, department, institution or board in any county in the State of Florida for service rendered such county from funds from any source provided for the employment or service regardless of whether the same is paid by county warrant or not, provided that such compensation, in whatever form paid, shall be specified in terms of fixed monthly salary by the employing county agency or county officer."

Justices of the Peace are provided for in this State by §21, Art. V of the State Consti., and Constables by §23 of said Art. V. Section 6, Art. VIII, of the State Consti., provides for the election "in each county of the following *county officers*: A clerk of the circuit court, a sheriff, *constable*, a county assessor of taxes, a tax collector . . ." It is provided in §10, Art. XVIII, of the State Consti., that "the first election for county judge . . . *justices of the peace, constable, and all other county officers* shall be at the general election in 1888." The State Consti. clearly treats the Justices of the Peace and Constables as county officers. Justices of the Peace have often been held to be county officers (*Martineau v. Crabbe*, 46 Utah 327, 150 P. 301; *State v. Clark*, 51 N.J.L. 97, 15 A. 831; *Commonwealth v. Cameron*, 259 Pa. 209, 102 A. 879; *Thrush v. People*, 53 Colo. 544, 127 P. 937; *Ballantyne v. Bower*, 17 Wyo. 356, 99 P. 869, 17 Ann. Cas. 82; *Rush v. Lung Sanitarium*, 106 Colo. 589, 109 P. 2d 265; *McNichols v. City of Denver*, 109 Colo. 124 P. 2d 601; 51 C.J.S. 11, Section 1).

Justices of the Peace and Constables are within the purview of Chapter 145, Florida Statutes, as well as Section 116.03, Florida Statutes, and are required to file reports under these statutes as county officers. Under Chapter 145, Florida Statutes, the Justices of the Peace and Constables are permitted to charge clerk and secretary expense as expenses of their offices under said Chapter 145, so long as such expenses are reasonable. Such expenses are not to be considered as a part of the compensation of the officer and he may draw his limit, if the income of the office justifies, over and above such expenses. As such compensation paid to the said clerks and secretaries comes from the income of the office over and above the compensation allowed the officer if it were not so paid it would go to the county as excess fees when the income of the office is sufficient to pay the officer his limit under Section 145.01, Florida Statutes. Such compensation is paid from the income of the office as distinguished from the compensation of the officer.

From the above and foregoing it clearly appears that clerks and employees of Justices of the Peace and Constables, when employed in connection with the operation of their offices and to assist in the performance of the official duties of such offices, are within the purview of the County Officers and Employees Retirement System of this State (Chapter 134, Florida Statutes). The above question is answered in the affirmative.

December 30, 1953.—053-341.

RETIREMENT SYSTEM—MEMBER—
APPOINTMENT TO COUNTY HISTORICAL COMMISSION

QUESTION: May a person retired under subsection (3) of §134.18, F. S., be appointed and become a member of a county historical commission established under and by virtue of Ch. 28306, Laws of Florida, Acts of 1953, without affecting his retirement compensation?

To: Honorable C. M. Gay, State Comptroller:

For a person to be eligible to retire under subsection (3) of §134.18, F. S., he must have been a member of both the state and county retirement systems and when retired he will draw retirement compensation from both systems. When a person has retired under either or both of the said retirement systems he is under certain limitations as to further state and county employment or office holding (see §121.14 and 134.14, F. S., as amended in 1953 Legislature)

Sections 121.14 and 134.14, F. S., as amended by Ch. 28258, Laws of Florida, Acts of 1953, preclude a retired person from drawing retirement compensation while reemployed, and otherwise provide certain regulations which must be followed.

This brings us to the consideration of the nature and status of the members of county historical commissions under Ch. 28306, Laws of Florida, Acts of 1953. Such commissioners are appointed and selected by the boards of county commissioners, except the clerk of the circuit court is ex officio a member of the state commission. Under §27, Art. III, of the State Consti., state and county officers, other than those expressly provided for in the said constitution, are required to either be appointed by the Governor or elected by the people. As the members of county historical commission are selected by the boards of county commissioners it is doubted that they should be taken and considered as state or county officers. "The members of the Historical Commission shall receive no compensation" (§2 of said Ch. 28306) although they may be paid their actual expenses with certain limitations (§7 of said Ch. 28306).

There seems to be no limitation upon the period of time for which such members are selected; this is a further indication that the members are not state or county officers (see §7, Art. XVI, State Consti.). The duties of the commission appear to be largely ministerial in their nature (§4, of said Ch. 28306).

It is our conclusion that the members of county historical commissions are neither state or county officers or employees, but are in the nature of an advisory and ministerial board or agency which, without compensation, select historical material relating to the county and state, which material is filed for future reference by the Clerk of the Circuit Court.

The above question is answered in the affirmative.

COUNTY BUILDINGS; ERECTION, MAINTENANCE, LEASE, ETC.

May 26, 1954.—054-127.

COUNTY JAIL—EQUIPPING AND FURNISHING— ESCAMBIA COUNTY

QUESTION: Does §135.01, F. S., contemplate that a portion of the building tax thereby authorized may be expended to fur-

nish and equip the physical plant of the county jail or court house of Escambia County?

To: Honorable Langley Bell, Clerk Circuit Court—Honorable Jack H. Greenhut, Attorney, Board of County Commissioners, Escambia County, Pensacola, Florida:

From the file submitted, which is returned herewith, it appears that by resolution, dated February 3, 1953, the Board of County Commissioners of Escambia County determined that, pursuant to §135.01, F. S., it would levy a building tax not to exceed five mills per annum for a period of not more than 15 years, for a combined project of erecting and/or repairing the county court house and jail. It also appears from said resolution that prior to the date of its adoption, the county had levied a special five mill tax for each of the two projects, separately, that is, five mills for the jail building and five mills for the county court house and that tax funds had already accrued thereunder. §2 of said resolution provides that all monies received from such separate building taxes should be placed in a special fund and "... the monies so deposited in said fund shall be used only and for the sole purpose of paying for the cost of the erection and/or repairs of said court house and jail and for no other purpose."

Also, appearing in the court file is a resolution the Board of County Commissioners adopted at its meeting on March 14, 1953. The later resolution refers to the earlier, and authorizes the issuance of certificates in a sum not to exceed \$1,900,000, the amount to be dependent upon "... the cost of the combined project to be constructed according to the plans and specifications and the contract between the County and the successful bidder for the construction of the same, together with necessary engineering, fiscal, legal and other expenses incidental thereto ..." (§3). Section 10 of said resolution, in setting forth the form of proposed certificate, provides that the proceeds are to be used "... to finance the cost of a combined project consisting of the construction of a new jail and the erection of and/or repairs to the county court house building in Escambia County, Florida ..." Section 12 thereof provides that the building tax, levied under §135.01 F. S. "... shall be used solely for the purpose of paying the cost of said combined project ...", while §17 provides that the funds are to be applied "... solely to the payment of the cost of said combined project and for the purposes incidental thereto and for no other purpose whatsoever."

In the validation proceedings had in the Circuit Court of Escambia County, styled County of Escambia, Petitioner vs. State of Florida, et al, Respondents, a rule nisi was issued by Honorable L. L. Fabisinski, Circuit Judge. The rule recites that the proceeds from the certificates are to be used "... to finance the cost of erecting a new jail and of erecting and/or repairing the County court house building in Escambia County, Florida ..."

The prospectus issued in connection with the sale of said certificates on page 3 thereof under "PROJECT" contains the item, "Equipment and furnishings—both projects \$100,000.00." You

have enclosed photostats of some purchase orders of Escambia County, which include office furnishings, equipment, radio, fingerprint and identification equipment and miscellaneous. We, of course, assume that all requirements for competitive bids have been or will be met.

While the recitals in the resolutions of February 3 and March 14, 1953, are indicative of the intent of the Board, we do not believe it is possible for any language therein to broaden or extend what the Legislature intended by authorizing the levy of the special tax. Consequently, the language in the resolution of March 14, 1953, specifying the uses to which the monies realized from the sale of certificates might be put, including "... for the purposes incidental thereto . . .", can have no effect on whether or not the Board has the power under the statute to purchase office furnishings, etc.

We think this question was answered by the Supreme Court of Florida in the case of *State ex rel. Davis et al v. Barber*, 139 Fla. 706, 190 So. 809. In that case the Board of County Commissioners of Baker County had adopted a resolution providing for the issuance of County bonds to "erect, construct, furnish and equip" a court house under authority of Section 2309 C. G. L. of 1927, which authorized boards of county commissioners to issue bonds to "erect" court houses, roads and other public structures. The resolution was attacked as being invalid because it authorized the Board of County Commissioners to "erect, construct, furnish and equip" a court house while the act only authorized them to "erect" a court house. The Supreme Court held that there was no merit to this contention and said:

"As applied to a public structure like a court house, there is nothing comprehended in the phrase 'erect, construct, furnish and equip', that is not comprehended in the term 'erect.' Erect and construct are synonymous, so are furnish and equip. As to a court house 'furnish' and 'equip' have reference to vaults, safes, heating system and other essential adjuncts that are a component part of the completed structure and without which it would be useless. A court house would not be adjudged erected till these were supplied." (Emphasis supplied).

The authority contained in Section 135.01, F. S. to "erect" or "repair" court houses and jails apparently carries with it the authority to "furnish" and "equip" such structures and the test to be used in determining whether particular items constitute furnishings and equipment is: Will the item become a component part of the completed structure and without which it would be useless?

As pointed out by the Supreme Court, vaults, safes, air conditioning and heating systems would come within the rule and their purchase would be authorized. Benches or seats which are built in or affixed to the building, racks, guard rails and similar items would also appear to come within the rule. On the other hand items such as ordinary movable chairs, desks, tables, office

supplies, such as typewriters, adding machines, etc. would seem not to come within the rule and their purchase with these funds would not be authorized.

It would be impracticable for us to attempt to list the items or things which we think would constitute fixtures, equipment, or furnishings within the stated rule. Each item has to be independently considered.

We think the question should, subject to the foregoing observations, be answered in the affirmative.

COMPENSATION OF COUNTY OFFICIALS

March 16, 1954.—054-64.

COUNTY TAX ASSESSOR—COMPENSATION

QUESTION: May a County Tax Assessor apply income of his office received in one year to the year in which earned, being a year prior to that in which received, so as to increase his compensation under §145.01, F. S., for the year in which earned?

To: *Honorable C. M. Gay, State Comptroller:*

We have examined State Auditing Department's Audit Report No. 3933, dated September 10, 1953, and reflecting, among other things, an audit of the books and records of the County Tax Assessor therein mentioned for that period of time "beginning May 1, 1950, and ending January 5, 1953, and subsequent transactions to January 22, 1953," which report seems to furnish the basis for the above question. We gather from the said audit report and other information that the income of the said Tax Assessor for certain years was below the limit of that allowed by §145.01, F. S., but that the Tax Assessor in order to increase his compensation for such years applied certain commissions and fees to his account for that year, said commissions and fees having been earned in that year but paid to him in subsequent years, instead of applying them to his account for the year in which payment was received.

Section 193.65, F. S., provides the compensation to be received by County Tax Assessors for assessing taxes, and further provides, in subsection (4) thereof, that "all amounts paid as compensation to any tax assessor or to any tax collector under the provisions of this or any other law shall be a part of the general income compensation of such office *for the year in which received*" The above provision appeared in §2, Ch. 17876, Laws of Florida, Acts of 1937, and subsequent amendments and revisions of the said law. We find no similar provision in statutes or laws prior to the said 1937 enactment. This provision of the statute was considered by this office in its opinions reported in 1937-8 Biennial Report 88, 1947-8 Biennial Report 199, 1949-50 Biennial Report 230 and 1951-2 Biennial Report 300, in which opinions it was held that the commissions and fees therein mentioned were income of the office in the year received and not in the year when

earned. We find no opinion of the Supreme Court holding the said provision unconstitutional and invalid, in consequences of which we are presuming the validity of the said statutory provision. We find no special, local or population Act applicable to the county in question which is in conflict with the said provision in said §193.65, F. S., or which might be said to repeal it as to said county.

The cases of *Crooks v. State*, 141 Fla. 597, 194 So. 237, *State v. Wood*, 140 Fla. 176, 191 So. 837, and *Lafayette County v. Dees*, 144 Fla. 669, 198 So. 694, are of little, if any, assistance in determining the above stated question. In the case of *St. Lucie County v. Nobles*, 149 Fla. 385, 5 So. 2d 855, the commissions and fees, which were earned during the year 1936, were paid to the Tax Collector during the year 1937 but prior to June 1, 1937 (Chapter 17876, Laws of Florida, Acts of 1937, became a law on June 14, 1937) so that such payment had been received prior to Ch. 17876 and the Tax Collector had acquired a vested right thereto under prior statutes. The cases of *Tyler v. Thomas*, 114 Fla. 368, 153 So. 848, *Tyler v. Nobles*, 117 Fla. 328, 161 So. 283, and *Lee v. Smith*, 111 Fla. 91, 149 So. 67, were decided prior to the enactment of Ch. 17867, Laws of Florida, Acts of 1937, and are not applicable here.

The above question is answered in the negative. We feel that the State Auditing Department was correct in following the requirements of the last sentence of subsection (4) of §193.65, F. S., in its said Audit Report No. 3933.

June 9, 1954.—054-138.

CLERKS CIRCUIT COURT—FEES—INCOME OF OFFICE

QUESTION: "If the clerk or any one in his employment should make a list of property transfers and suits filed in his office for a City, Firm, Corporation or individuals, this work being done on the Clerk or employees own time, as an accommodation and not a duty of the office" should the compensation therefor be considered income within the meaning of Ch. 145, F. S.

To: *Honorable Lloyd M. Hicks, Clerk of Circuit Court, Manatee County, Bradenton, Florida:*

The crux of the question is whether or not the Clerk performs the service referred to as an official act of the office. I do not believe the fact the work is done outside of working hours is by any means determinative of whether or not the remuneration received is to be considered as income of the office.

Section 28.19, F. S., pertaining to fees for recording, in part provides:

"Such records shall always be open to the public, under the supervision of the clerk, for the purpose of inspection thereof, and of making extracts therefrom; *but the clerk shall not be required to perform any service in connection with such inspection or making of extracts without*

payment of the compensation fixed by law." (Emphasis supplied)

There is a strong intimation in the underscored language that an official duty rests upon the clerk to make extracts of his records for the fee provided by law. An examination of §28.24, F. S., which itemizes fees for clerks of the circuit court, reveals two items, fixing the fee for the services contemplated by the question now under consideration, namely: "Copying any record or paper . . ." and "Writing any paper other than herein specifically mentioned, same as for copying . . .". These provisions contemplate that where the clerk performs services by way of compiling lists of property transfers and suits from the official records of his office, that such services are in his official capacity as clerk and consequently are official acts. The fees permitted by and received under this statute are income of the office and come within the purview of Ch. 145, F. S.

The question, therefore, is answered in the affirmative.

This is not to be construed as overruling the opinion of my predecessor in office (Biennial Report of Attorney General, 1947-1948, page 167). There apparently the determining factor was that the clerk in contracting with the board of county commissioners for indexing of old records was to perform a service which his predecessor or predecessors failed to perform, although there was a statutory duty upon them to keep and maintain such indexes [§§28.21 (12), 28.22 (11) and 28.23, F. S.]

February 3, 1953.—053-24.

SHERIFF'S EXPENSES—DEDUCTIONS—ASSESSMENT— DEATH FUND FOR DEPUTIES

QUESTION: Whether it is legal for a sheriff to charge as expense item of his office the \$10 assessment contributed to the sheriff's death fund for the benefit of his deputies?

To: *Honorable R. L. Kendrick, Sheriff, Escambia County, Pensacola, Florida:*

As provided by §145.01, F. S., 1951, the sheriff, as a county official is only entitled to a certain net income according to the formula set forth in the statute, and all excess fees above this amount collected from his office must be paid over to the county. Section 145.02, provides that in the determination of net income, each county official is entitled to deduct the reasonable expenditures made for salaries of clerks and assistants and the necessary expense for the proper operation of the office.

It is my opinion that the provision in §145.02, allowing a deduction for necessary expenditures for the proper operation of the office entitles a sheriff only to deduct those expenses connected with the necessary operation and maintenance of his office that are incurred in the performance of his duties as sheriff and it is not within the purview of §145.02 to allow a sheriff to deduct the assessment in question as an expense item of his office.

It is, however, discretionary for the sheriff under the law, to pay a salary to his deputies which accordingly compensates them for the value of their services. It would be proper and legal for a sheriff in fixing the yearly compensation of his deputies to set a sum which would include the \$10 assessment as part of the salary for each deputy.

February 4, 1953.—053-25.

COUNTY JUDGE AS JUVENILE JUDGE—EXCESS FEES—
\$145.01, F. S.—ST. LUCIE COUNTY

QUESTION: Whether the compensation paid to the Judge of the Juvenile Court of St. Lucie County under §39.18, F. S., 1951, constitutes fees or commissions within the purview of §145.01, F. S., 1951, and as such are accountable as excess fees?

To: *Honorable Frank Fee, County Attorney, St. Lucie County, Ft. Pierce, Florida:*

The compensation of county officials, who are paid by fees or commissions for the performance of their official duties, is fixed by §145.01, F. S., 1951. An opinion rendered by this office (049-10) to the Honorable Flem C. Dame, County Judge, St. Lucie County, Ft. Pierce, Florida, stated that the county judge, who also acted as Juvenile Judge, was to include in his report as other remuneration, under the provisions of §145.03, the salary he received as Juvenile Court Judge.

The 1951 legislature enacted Ch. 26880, Laws of Florida, 1951, Ch. 39, F. S., 1951, known as the Juvenile Court Act, established a uniform state-wide procedure for the handling of dependent and delinquent juveniles, and under the provisions of that act, 049-10 is no longer applicable, due to a subsequent change in the law.

Section 38.01 provides that the county judge's court shall be the juvenile court in every county in which no separate juvenile court is established. Section 38.19 (2) provides that the board of county commissioners of each county may pay an annual salary to the juvenile court judge out of the juvenile court fund, according to the amount set forth in the statute. Section 39.18 (5) provides as follows:

"In counties where the county judge is juvenile court judge, the salary of the juvenile court judge may be paid to the judge in addition to compensation received in the capacity of county judge."

It is specifically provided under the provisions of §39.18 (5) that the salary paid to the county judge, who also acts as juvenile judge, is an additional sum to the compensation received in his capacity as county judge. Therefore, the salary paid by the Board of County Commissioners of St. Lucie County paid to the County Judge for acting as Juvenile Judge is separate and distinct from the compensation and fees he collects for the performance of his

other duties in the capacity of County Judge, and are not thereby considered excess fees as contemplated within the provisions of §145.01. However, under the provisions of §39.18 (7), the County Judge of St. Lucie County is limited to an annual salary paid by the County Commissioners for acting as Juvenile Judge, which, together with the compensation and fees he receives for the performance of his other duties as County Judge, would not exceed the largest annual salary paid to any Circuit Judge in the Ninth Judicial Circuit which includes St. Lucie County.

COUNTY TRAFFIC OFFICERS

September 9, 1953.—053-234.

MUNICIPALITIES—TRAFFIC OFFICERS—ARRESTS— SERVICE OF PROCESS—POWERS AND DUTIES

QUESTIONS: 1. Do traffic officers under Ch. 146, F. S., have the authority to make arrests within the limits of incorporated cities and towns without first having been designated as police officers by such cities and towns?

2. Do traffic officers have authority under §146.04, F. S., to serve criminal process and make arrests, with or without warrants, within the corporate limits of cities and towns?

To: Honorable T. W. Conely, Jr., County Attorney, Okeechobee, Florida:

Upon observing closely the wording of §§146.01 and 146.06 as follows:

"All officers of the law, engaged in policing traffic on the public highways of the State of Florida *outside the limits of incorporated cities and towns*, * * *", (Emphasis supplied.)

and the wording in §146.07 as follows:

"Any officer, engaged in policing traffic on the public highways arresting or attempting to arrest any person for violating any traffic law *outside the limits of incorporated cities and towns in this state*, * * *". (Emphasis supplied.)

It appears from the recurrence of such wording, throughout the chapter, that it was the intent of the legislature that the *primary duties* of the county traffic officers should be that of patrolling roads in their respective counties, policing traffic on the public highways and enforcing the state traffic laws outside the limits of incorporated cities and towns. In addition to the primary duties of said traffic officers, it appears from other wording in Ch. 146 that traffic officers are vested with a secondary prerogative, that of making arrest and service of criminal process the same as sheriffs and constables. (Emphasis supplied.)

Section 146.01 provides that traffic officers "shall be duly

appointed and qualified deputies acting under the respective sheriffs of the several counties in said state . . ."

Section 30.07 provides that "sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, * * *".

Section 146.04 provides that the traffic officers, provided for in §146.01, "* * * shall have the same power of arrest and service of criminal process as sheriffs and constables, and may arrest, with or without warrants, persons committing in their presence violations of the laws of Florida". (Emphasis supplied).

The wording of §146.04, in its clear, concise and unambiguous language, fixes no limitations or restrictions upon the general power given in said section. Therefore, nothing is left to be construed outside of the literal interpretation of the clear and unambiguous language.

In my opinion dated August 4, 1950, No. 050-381, it was stated:

"* * * it is my opinion that traffic officers are vested with the authority to serve criminal process as provided by Section 146.04 above."

Traffic officers come within the meaning and definition of peace officers, and, as such, they may arrest without warrants as provided for in §901.15, F. S. Among the instances therein recited, subsection (1) of said section explicitly provides that a peace officer may arrest for violation of a municipal ordinance when committed in his presence or on fresh pursuit. In such an instance the traffic officer would necessarily have to turn the arrested person over to the chief of police.

In an opinion by the Honorable Cary D. Landis, Attorney General, dated May 23, 1935, with reference to the jurisdiction of traffic officers, it was stated as follows:

"* * * I beg to advise that county traffic officers under the statute have the same power of arrest and service of criminal process as the sheriffs and constables. This of course applies only in the enforcement of the traffic laws."

My views with reference to the power of arrest and service of criminal process by traffic officers are in accord with this opinion except for the last sentence, namely: "This of course applies only in the enforcement of the traffic laws." This last sentence appears to be incorrect when we consider the clear unambiguous wording of §146.04 with reference to the powers of traffic officers in the matter of arrest and service of criminal process, and the general powers of peace officers provided for in §901.15 supra.

In consideration of the sections above quoted from and commented upon, I am of the opinion that questions 1 and 2 should be answered in the affirmative.

COUNTY HOSPITALS

February 22, 1954.—054-39.

COUNTY HOSPITALS—EXTENSION AND IMPROVEMENT

QUESTIONS: 1. Does Ch. 155, F. S., apply only to counties which have no existing county hospitals?

2. Could Ch. 155, F. S., possibly apply to a county which wishes to make an addition to an existing hospital?

3. Do local or special Acts regarding county hospitals have to be in agreement with the general provisions of Ch. 155, F. S.?

4. Was there a model bill which guided the members of the Legislature who wrote the recent county hospital Acts?

5. Where a county has an existing county hospital (for example, Alachua County), what legal action will be necessary in order to construct an addition to such existing hospital?

6. Where a county has an existing county hospital, is a legislative Act necessary where the County Commissioners call a special election for approval by the freeholders of a bond issue?

7. Would legislative action be required if the said county desires to finance an addition to its existing hospital by the issuance of revenue certificates?

To: Florida State Improvement Commission:

In the case of *Crow v. Dade County, Fla.*, 54 So. 2d 753, the proposal was to issue bonds of the county for the "purpose of extending and improving the 'Jackson Memorial Hospital,' including the construction of additional buildings and the enlargement of existing buildings and the acquisition of any land and equipment necessary therefor." This extension and improvement contemplated the use of the hospital in connection with the University of Miami Medical School, as well as its usual uses as a hospital. The court upheld the right of the county to make such enlargement and extension upon proper vote of the people of the county. It seems evident that the county was proceeding under Ch. 155, F. S., when making such enlargement and extension. It is evident from the opinion that the needs and requirements of the people of the county are material in determining the size and equipment of the county hospital under Ch. 155. In *Crow v. Dade County, supra*, a six million dollar extension and improvement of an existing hospital were approved upon the basis of the needs and requirements of the community using the hospital. It, therefore, appears that the court, in the above case, has answered the first above question in the negative, and the second in the affirmative.

It is a general rule of law that the Acts of one Legislature are not binding upon future legislatures (*Trustees Internal Improvement Fund v. St. Johns Railway Company*, 16 Fla. 531, *Gonzales v. Sullivan*, 16 Fla. 791; *Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305) and one Legislature cannot by its enactment prevent future change in such law by subsequent legislatures

(*Kirklands v. Town of Bradley*, 104 Fla. 390, 139 So. 144). This being true, local and special Acts providing for the establishment, improvement or additions to hospitals do not have to be in agreement with the provisions of Ch. 155, F. S. Whether or not a special or local law is to be supplemented by Ch. 155, F. S., must depend upon the terms of the said special or local law and the intention of the Legislature when it enacted such special or local law. This seems to answer the third question.

So far as we are advised, there was no model bill used as a guide by the drafters of recent legislation regarding hospitals and their extension or improvement. Prior Acts of the Legislature are usually resorted to, for example the Halifax hospital district act (Ch. 11272, Acts of 1925, and its amendments and extensions), and other early Acts. This seems to answer the fourth question as well as it may be answered.

In *Crow v. Dade County*, *supra*, it appears that substantially the same proceedings were followed in providing for an addition and extension of a hospital as would have been followed had the proceeding been for original establishment. This reference seems to answer the fifth question. A bond election for the purpose of making an addition and extension of an existing hospital was called and received court approval in the *Crow v. Dade County* case, evidently without additional or special legislation. These observations seem to answer the sixth question.

Under §155.05, F. S., where the county, "by reason of funds on hand, or donations, or otherwise, are able to build and establish a public hospital without issuing bonds as provided in §155.04, then such board of county commissioners are hereby authorized and empowered to establish such hospital," without the issuance of bonds. Although there has been no construction of this section by the Supreme Court as being broad enough to permit the issuance of revenue certificates for the purpose of hospital construction, we are inclined to the view that under proper conditions and circumstances a county hospital might be financed by the issuance of revenue certificates. No attempt will here be made to define the conditions and circumstances that would justify financing by revenue certificates. This answers the seventh question as well as it may here be answered.

June 18, 1954.—054-151.

COUNTY HOSPITALS—INSOLVENT PERSONS—DEATH IN— HOSPITAL BILL—COUNTY LIABILITY

QUESTIONS: 1. Where a resident of "A" county is injured and hospitalized in "B" county's hospital where he dies, is "A" county liable for the hospital bill when decedent's estate is insolvent?

2. If the above question is answered in the negative may the Board of County Commissioners of "A" county make volunteer payment of the said hospital bill?

To: Honorable W. Kenneth Barnes, Attorney at Law, Dade City, Florida:

We are not advised of any special or local laws in either of said counties bearing upon the questions or either of them, so we must presume that there is no such special or local provision. We further presume that the county hospital in question exists under and by virtue of Ch. 155, F. S., and that it is for the primary use and benefit of the residents of the county wherein it is established "and of any person falling sick or being injured or maimed within" the limits of said county (§155.16, F. S.). Although charity patients of the county may be cared for in the hospital (§§155.16 and 155.20, F. S.,) it is not in fact a charity hospital, but may charge those able to pay for hospital care therein (§§155.16 and 155.20, F. S.).

Counties in the State of Florida "shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity or misfortune may have claims upon the aid and sympathy of society" (§ 3, Art. XIII, State Constitution). Boards of county commissioners are charged with the care and providing "for the poor and indigent people of the county. (§125.01 (4), F. S.). Boards of county commissioners have only such powers as are prescribed by the State Constitution and statutes (State v. Culbreath, 128 Fla. 210, 174 So. 422; Crandon v. Hazlett, 157 Fla. 574, 26 So. 2d 638; Gessner v. Del-Air Corporation, 154 Fla. 829, 17 So. 2d 522) and have no general powers.

When the injured person was admitted to the hospital and received treatment there arose between him and the hospital the relation of creditor and debtor. "in the absence of a statute a county . . . is not liable for medical service or hospital care voluntarily furnished for the relief of a pauper, without a proper contract with, or request from, the officers of the poor or some one in authority, at least if no emergency exists . . . (70 C. J. S. 159, §74). Where ample time elapses between the time one is admitted to a hospital and his death for the question of his hospital expenses to have been taken up with his county officers, we doubt that such expenses could be said to have been incurred under an emergency, at least where he lingered three or more weeks before death. The request for opinion shows that about twenty-six days elapsed between the hospitalization and the death. Under the circumstances we are inclined to think that the first above question should be answered in the negative, at least if we have been furnished with full details.

County funds are administered by the Board of County Commissioners in the nature of a trust and we doubt the authority of such board to pay an account or demand where there is no liability on the part of the county to pay the same. We doubt the authority of a board of county commissioners to pay a moral claim against their county where there is no legal obligation on the part of the county to pay the same. The second question, under the circumstances, is answered in the negative.

CHAPTER XII

CITIES AND TOWNS

MUNICIPAL CHARTER AND CHARTER AMENDMENTS

August 21, 1953.—053-211.

MUNICIPAL JUDGE—WITNESS UNDER SUBPOENA— IMMUNITY—CITY OF HOLLYWOOD

QUESTION: Has the municipal judge of the city of Hollywood, Florida, authority to grant immunity to a witness under subpoena?

To: *Honorable J. I. Watson, Municipal Judge, Hollywood, Florida:*

We find no general provision under which a municipal judge may compel a witness to testify and then immunize him from prosecution. You, of course, will know the powers and duties given to the municipal judge by the charter of the city of Hollywood, Florida, on this subject.

The proposition of immunity which is now before you is discussed in Section 886, 70 C. J. 733 in the following words:

"To compel a witness to incriminate himself, the immunity of the witness from prosecution must be sanctioned by law; the mere equitable right to clemency, the suggestion or assurance of the court, the grace or favor of the prosecutor, or his promise, unless binding by law, is insufficient."

In an opinion per curiam, 185 So. 323, the Supreme Court of Florida has ruled as follows:

"The right to immunity from prosecution is equitable merely, based on the pledged faith of the public, and does not entitle the accomplice to plead the promise of immunity as a bar. He is not entitled to discharge as a matter of right, but must abide by the sound discretion of the Court and prosecuting attorney. 16 C. J., Criminal Law, Sec. 65, p. 94; *Newton v. State*, 15 Fla. 610; *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369; Notes in 40 Am. St. Rep. 767, 774 and 24 L. R. A., N. S., 439, 440."

Your question, therefore, is answered in the negative.

GENERAL POWERS OF MUNICIPALITIES

February 15, 1954.—054-33.

ALTAMONTE SPRINGS—TOWN COUNCIL—AUTHORITY— APPROPRIATION—VOLUNTEER FIRE DEPARTMENT

QUESTION: May the Town Council of Altamonte Springs appropriate money for the purchase and maintenance of fire equipment to be used in support of the Altamonte Springs Volunteer Fire Department, a non-profit corporation?

To: *Honorable Mack N. Cleveland, Jr., Representative, Seminole County, Sanford, Florida:*

The charter of the Town of Altamonte Springs is found in Ch. 8913, Laws of Florida, 1921, as amended. The amendments, however, have no bearing upon the question under consideration. The Town Council may adopt any and all ordinances necessary for the preservation of the peace, health, safety and general welfare of the town (§§8 and 13 of the charter). The obtaining, equipping and maintaining of a fire department is certainly in the interest of the public health, safety and welfare. That such answers a municipal purpose cannot be doubted, so there has been compliance with Art. IX, §5 of the Florida Const.

We are concerned here mainly with the provisions of §10, Art. IX, Florida Const., which prohibit the Legislature from authorizing, among other things, a city to "... appropriate money for, or to loan its credit to, any corporation, association, institution or individual." This should be considered although there is no legislative act directly in question.

In *State ex rel. Barnett National Bank v. Thursby*, 112 Fla. 257, 150 So. 352, the contention was made that legislative acts authorizing appropriation of county funds for the benefit of Volusia County Fair Association, a non-profit corporation, loaned the credit of the county to the corporation (Art. IX, §10, Florida Const.). The court said: "We think this position is not tenable. Under the statutes, the fair association became a county agency to expend public money for a county purpose, ... In other words, the relator advanced the money to a county agency for a county purpose with the approval and consent of the board of county commissioners. ..."

Since appropriation of county funds for a fair association answers a county purpose and does not offend the Const., then certainly the appropriation of municipal funds for a volunteer fire department should not contravene the provisions of Art. IX, §10 of the Florida Const. It is difficult to visualize a situation where the city may render a greater service to its citizens than by protection from fire.

It is, of course, assumed that all sums appropriated by the city will be devoted to services within the municipality, and that the title to all equipment, supplies, etc., will be in the municipality, the volunteer association having no claim or interest therein, but only the use thereof.

Based upon this assumption, your question is answered in the affirmative.

July 29, 1954.—054-178.

EXCISE TAX—ITINERANT RENTALS—
JACKSONVILLE BEACH, CITY OF

QUESTION: May the City of Jacksonville Beach, under §§81 and 87 of Ch. 18623, Laws of Florida, 1937, (Charter of City of Jacksonville Beach) levy an excise tax of two percent on "itinerant rentals" within the city?

To: *Honorable Steffen Straford, City Attorney, Jacksonville Beach, Florida:*

Since you did not call our attention to legislation other than the above, we, therefore, assume that these provisions alone are pertinent to the question. We also assume that by use of "itinerant rentals", you refer to those received from other than permanent guests, such as rentals taxable under the "Florida Revenue Act of 1949."

Section 81 of your Charter reads:

"The City of Jacksonville Beach is hereby authorized to levy and enforce license or occupational taxes upon any and all occupations; businesses or professions, and to grade and fix the amounts in the same manner that the Legislature of the State of Florida could impose such licenses or taxes for State purposes."

Also, the pertinent part of Section 87 provides:

"The City Council shall have power by ordinance to levy and collect taxes on all property and privileges taxable by law for state purposes"

The court in *Heriot v. City of Pensacola*, 180 Fla. 480, 146 So. 654, perhaps the leading case on the point, upheld an ordinance which levied a tax upon the purchases of certain utilities distributed within the city, under its power "To levy, assess and collect taxes" It was pointed out that the tax was a privilege tax.

The later case of *City of Pensacola v. Laurence*, 126 Fla. 830, 171 So. 793, involved the provisions of a legislative act empowering the city to levy license taxes upon occupations and privileges. The city ordinance levied a 2% tax upon each real estate sale within the city. The court said that ". . . a privilege as used . . . has reference to a franchise or right granted one by the government" (page 795). Also,

"The power to impose an excise tax on 'occupations' and 'privileges' has reference to those in which the payer of the tax is engaged in a continuing series of transactions, it certainly could have no reference to remote, isolated, or infrequent sales of real estate. If it could be so construed then by the same token, the city can enact an ordinance imposing an excise tax on the sale of every

dog, cat, chicken, mess of greens, or other commodity sold from the backyard.

In other words, the power to create new occupations and privileges and impose excise taxes for their exercise should be given in unmistakable terms and when tested by this standard we find no such power conferred on the city."

The court found there was no power in the city to enact the ordinance in question.

In *Asbell et al v. Green*, 159 Fla. 702, 32, So. 2d 593, the court had before it an ordinance of the City of Panama City which levied a sales or use or service tax upon all business transactions in the city, except real estate sales. The city under its Charter was empowered to "... impose a tax upon any and all business, professions, and occupations engaged in or carried on..." Justice Buford, who wrote the opinion, after quoting at length from the *Laurence* case, *supra*, held the ordinance attempted to do what was condemned by the earlier decision. However, in the concluding paragraph the court said the decision did not mean that the City of Panama City did not have power to levy a sales tax on businesses, "... where the payer of the tax is engaged in a continuing series of transactions . . ."

In *Paramount-Gulf Theatres, Inc. v. City of Pensacola*, 62 So. 2d 431, the City of Pensacola sought to validate certain revenue certificates which pledged proceeds of an amusement tax. The original opinion, written by Associate Justice Dickinson, with two Justices dissenting and one not participating, held that the city had no power to levy the amusement tax, pointing out that taxing powers are to be strictly construed. On first rehearing it was pointed out: "And this court appears to follow the rule that a grant of general taxing power to a municipality does not authorize it to impose an excise tax." (page 434). Doubt was also expressed that by reason of the later *Asbell* case, *supra*, as to whether or not without legislation, the city might levy the amusement tax. The court receded from its original opinion holding that a confirmatory special act granted the city the authority to levy the amusement tax. The opinion on second rehearing does not touch upon our question.

In some respects it may be difficult, if not impossible, to either distinguish or reconcile the Florida cases. Nevertheless, I believe we can, without serious question, conclude: (1) that since the taxing power is to be strictly construed, a general grant of authority to a municipality to tax businesses and occupations, does not authorize the levy of excise taxes by way of sales tax. Stated another way, specific authority must be granted a municipality to levy excise taxes; (2) that the levy of excise taxes can be valid only where they tax a series of transactions, as distinguished from isolated sales.

By reason of the above, I believe you will agree with me that there is a serious doubt that the general powers granted under §§81 and 87 of the Charter of the City of Jacksonville Beach, authorize it to levy the tax you contemplate.

Hence, the question is answered in the negative.

February 23, 1954.—054-43.

**MUNICIPALITIES—EMPLOYMENT OF SURVEYOR—FUNDS
EXPENDED UNDER §343.17, F. S.—MARY ESTHER, TOWN OF**

QUESTION: Where funds are received by a municipality, under the provisions of §343.17, F. S., may a portion thereof be expended in the employment of a surveyor for the purpose of surveying and platting dedicated streets within the corporate limits of the municipality?

To: Messrs. Stewart and Fleet, Attorneys for the Town of Mary Esther, Fort Walton Beach, Florida:

Said §343.17, F. S., after authorizing the board of county commissioners to make a special levy for road and bridge purposes, by its proviso reads:

“provided, however, that one-half of the amount so realized from said special tax on the property in incorporated cities and towns, shall be turned over to said cities and towns, to be used in repairing and maintaining the roads and streets thereof, as may be provided by the ordinances of such cities and towns.”

It is to be noted that the use of the funds is limited to *repairing and maintaining roads and streets within the municipality*.

In tracing the legislative history of what is now §343.17, F. S., we find that it had its origin in §20 of Ch. 4338, Laws of Florida, 1895, the proviso of that act reading:

“Provided, however, that one-half of the amount realized from said special tax on property in incorporated cities or towns shall be turned over to the municipal authorities of said cities or towns to be used in the repairing, working and improving and *laying out* of the streets thereof as may be prescribed by the ordinances of said cities and towns.” (Emphasis supplied)

This act was subsequently amended by Ch. 4769, Laws of Florida, 1899; §1, Ch. 5237, Laws of Florida, 1903; §1, Ch. 5677, Laws of Florida, 1907, and finally was put in its present form by §9 of Ch. 6537, Laws of Florida, 1913. The last expression of the Legislature (1913 Act) omitted the words “*and laying out*”, from said act. The present act was carried forward in R.G.S. of 1920 as §1604, and in the C.G.L. of 1927, as §2453.

The fundamental rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed

in the Statute (*American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524; *Richardson v. City of Miami*, 144 Fla. 294, 198 So. 51; *Chiapetta v. Jordan*, 153 Fla. 788, 16 So. 2d 641; *City of St. Petersburg v. Siebold*, 48 So. 2d 291 and other cases).

It seems clear that when enacted in 1895, the act was broad enough to permit payment for a service which might be connected with the *laying out of streets*, as well as the repair and maintenance. However, the omission of "laying out" from the 1913 act (§343.17, F. S.), indicates that the Legislature must have intended to contract and restrict the uses previously authorized by statute. If otherwise, the omission would be meaningless.

In order to give effect to what apparently was the legislative intent, and in the absence of court decision to the contrary, I feel that unless the employment and services of the surveyor has a direct connection with the *repairing and maintaining* of the municipal streets within the Town of Mary Esther, the municipality is probably without authority to expend funds so received under §343.17, F. S. This means that if a survey is necessary or deemed advisable in connection with the *repairing and maintaining* of streets, it is to be considered a proper charge against these funds, otherwise not.

I am wondering whether or not you have considered the possible use of funds received from cigarette taxes. §210.03(5), F. S. is rather broad in scope and includes engineering in connection with and the planning of municipal streets.

This seems to answer the question as definitely as is possible.

December 8, 1953.—053-324.

MUNICIPAL TAX—PURCHASES—TELEGRAPH SERVICE

§167.431, F. S.—PAHOKEE, CITY OF

QUESTION: May a municipality, pursuant to §167.431, F. S., levy a tax on each purchase of telegraph service?

To: Honorable Ralph O. Johnson, City Attorney, Pahokee, Florida:

Section 167.431, F. S., empowers the several municipalities "...to impose, levy and collect on each and every purchase of... telephone service and telegraph service in their corporate limits, a tax... In every case the tax shall be collected from the purchaser... and paid by such purchaser for the use of the city or town to the seller of such utility service at the time of the purchaser paying the charge therefor to the seller." It further provides that the seller of the utility service must act as collection agency for the municipality.

In *Peninsular Tel. Co. v. City of Clearwater*, 39 So. 2d 473, which involved the tax under §167.431 on telephone services, the court held that "The services taxed were in the category of 'occupation' or 'privilege' and by the terms of the title and body of the Act there can be no doubt that the purpose and gist of it was to authorize a tax on the utilities named in the ordinances here in-

volved." The court upheld the authority of the municipality to tax, in an amount "...not exceeding ten per cent of the price paid by the consumer to the seller." In the case of *City of Orlando v. Natural Gas & Appliance Co., Inc.*, 57 So. 2d 853, the court, at page 855 said: "The tax is not upon the person or the utility or the public utility selling the commodity. The tax is upon the person who purchases the commodity."

It is assumed that the City of Pahokee has power to levy license or excise taxes.

Based upon the authority above cited and upon the assumption stated, I conclude that within the limitations of \$167,431, F. S., the City of Pahokee may levy the contemplated tax.

You will be interested in the enclosed press release from the Florida Times-Union of December 9, 1953, reporting the decision of *Alabama Operating Co. v. City of Winter Park*, handed down on December 8. While we have not seen the court's opinion, apparently it follows the earlier cases cited above, by holding the city may levy a tax on the entire amount the telephone company charges its subscribers.

November 17, 1953.—053-308.

REVISION OF OPINION NO. 053-221 MUNICIPALITIES —PAVING ASSESSMENTS—STATE PROPERTY

QUESTION: May a municipality pave a street along State owned property and charge the costs and expenses of such paving against the State or its agency in charge of such property?

To: *Honorable Harry G. Smith, Director, State Budget Commission:*

The above question grew out of a paving assessment made by the City of Tallahassee against lands upon which is located the Old Supreme Court Building in Tallahassee, Florida, because of the paving of Madison Street between Adams and Duval Streets, said lien being in the amount of \$814.72, bearing date of August 21, 1951, together with interest from said date (amounting to \$102.64 as of August 21, 1953). The paving assessment was apparently levied and assessed under Ch. 24917, Laws of Florida, Acts of 1947; however, said Ch. 24917 does not expressly authorize assessments of benefits against the State or its agencies. "The State and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest." (59 C. J. 1103, §653.) The power of a municipality to "subject the property of the State to assessments of this character does not exist in the absence of statutes conferring it, and the power must be conferred either expressly or by necessary implication." (63 C. J. S. 1067, §1332; see also annotation in 90 A. L. R. 1143). In this State the public property of counties is not liable for municipal special assessments in the absence of a statute providing therefor (*Edwards v. City of Ocala*, 58 Fla. 217, 50 So. 421; *Alachua County v. City of Gainesville*, 67 Fla. 506, 65 So. 653 and see also 69 Fla. 581, 68 So. 759; *Blake v. City of Tampa*, 115 Fla. 348, 156 So. 97).

Under the State Constitution "no money shall be drawn from the State Treasury except in pursuance of appropriations made by law" (§4, Art. IX, State Const.). The purpose of this constitutional provision "is to prevent the expenditure of public funds without the consent of the people, by their representatives in legislative acts, and it secures to the legislature the exclusive power of deciding how, when and for what purpose the public funds may be applied..." (Lainhart v. Catts, 73 Fla. 735, 75 So. 47, text 54).

Reference is made to Ch. 28266, Laws of Florida, Acts of 1953, wherein it was "declared that the placing of sidewalks, the making of street improvements, sidewalk improvements, sanitary improvements, and like special benefits are proper and necessary parts of school plants and when such improvements are furnished to or in connection with such plants and that they are proper and necessary facilities for other state boards and agencies *whenever they are lawfully constructed so as to bring such benefits within the provisions of laws governing special benefits in this state...*" and which act further provides "that the County Boards of Public Instruction of the State of Florida, and other boards and agencies of the State of Florida, which have the handling and disposition of public moneys derived through the collection of taxes, be, and each of them is hereby authorized, from the funds in their hands or control, and coming into their hands and control, to expend such portion thereof as may be necessary for the purpose of paying off and discharging lawfully imposed encumbrances upon school properties, or properties of other state agencies or boards, *which encumbrances have been lawfully imposed thereon for special or local assessments for street improvements, sidewalk improvements, sanitary improvements and like special benefits.*" This chapter should be read, in so far as State property is involved, with §192.08 and §192.27, F. S., and the constitutional provisions relating to appropriations, and, in so far as county property is concerned, with the applicable budget statutes and laws.

Although said Ch. 28266 seems to authorize payment of special and local assessments lawfully imposed, it does not clearly make or provide an appropriation of funds for such payment. When the state appropriations for the 1953-1955 biennium were made there were not included any funds for the payment of special assessments such as the one here under consideration. We know of no previous appropriation for such purpose now in force.

From the above and foregoing laws and authorities it seems clear that before the paving assessment involved here may be paid from public state funds there must be a statute or law providing for its payment from state funds. Even if the state may be morally obligated to pay the claim, by reason of favors by the municipality to the State, state distributing officers are not authorized to pay the same in the absence of provision therefor being made by the legislature (Crane v. Frohmiller, 45 Ariz. 490, 45 P. 2d 955). Any public officer who pays or authorizes the illegal payment of public funds is personally liable for such illegal payment, and the reasonableness, practicability or expediency of such expenditure is no justification or defense (67 C. J. S. 409, §118).

The legislature by Chapters 9340, 10274 and 14514, Laws of Florida, Acts of 1923, 1925 and 1929, made specific provision, and provided appropriations, for the paving of certain streets upon which state property abutted. The provisions of these chapters were specific and not general; neither of them would be sufficient authority for the payment of the present claim. We have been unable to find, from a cursory examination of the statutes and session laws of this state, any clear and sufficient authority for the payment of the above-mentioned claim of the City of Tallahassee. Provision for the payment of the claim should not be made from state funds unless and until the city points out sufficient statutory authority for levying the paving lien against the state and a sufficient legislative appropriation authorizing the payment of the same from state funds.

July 24, 1953.—053-169.

RETIREMENT SYSTEM—DISSOLUTION— VALIDITY—CITY OF GULFPORT

QUESTION: Has there been a valid dissolution of the retirement system of the City of Gulfport, Florida, established and dissolved under the laws and circumstances recited below herein?

To: *Honorable James T. Vocelle, Chairman, Florida Industrial Commission:*

Chapter 24543, Laws of 1947, created a pension fund or system for employees of Gulfport, Florida. The act was a comprehensive one, providing retirement pensions for employees and widows of employees, and also benefits to persons permanently incapacitated "through injury suffered or illness contracted in line of duty." The act required certain contributions by participating employees, beginning with November 15, 1947; and further provided that no pension should be paid under the act prior to November 15, 1952.

Chapter 29105, Laws of 1953 (H. B. 795), repealed said Chapter 24543; and among other things, provided that any employee or former employee of Gulfport who shall have contributed toward the retirement and benefit fund established by Ch. 24543, should have refunded to him the amounts so paid, less financial benefits received; and that with the consent of any such employee or former employee entitled to return of his contribution, the city may apply such refund or part thereof in payment of retroactive old age and survivors insurance contributions of such employee, if and when the city shall be successful in effectuating OASI coverage for its municipal employees. It is unnecessary to recite further provisions of this act. An examination of the records in the office of the Secretary of State evidences that due notice of intention of making application for passage of said act was given, as required by Art. III, §21, Florida Constitution, and §11.02, F. S.

It appears from a certified copy of resolution of the Councilmen of the City of Gulfport, dated June 16, 1953, that no Gulfport city employee has retired or has become entitled to retire under

the provisions of Ch. 24543, Laws of 1947; and that "all employees and all persons entitled to actual or contingent benefits under the provisions of said act, now repealed, have manifested their intention in writing directed to this Governing Body wherein they gave up and relinquished any and all rights they might have, had or in the future might have under the provisions of Ch. 24543, Special Laws of Florida 1947, now repealed."

The request for opinion recites that an ordinance passed by the City of Gulfport on June 16, 1953, provided as follows: "Section XI—All monies which have been contributed by any city or former city employees to a pension fund for city employees set up under the provisions of Ch. 24543, Laws of Florida, Special Laws of 1947, entitled an act providing pensions for the employees of the Town of Gulfport, etc., (which pension system and pension law has since been repealed by H. B. 795, Laws of Florida, Special Laws of 1953), which contributions are not used and applied, with the employees' consent, to effect retroactive OASI benefits (sic) for such employee or former employee, shall be returned and paid over to such employee or former employee by the City of Gulfport."

Certified copy of resolution of July 7, 1953, of the Councilmen of said city provides: "NOW THEREFORE BE IT RESOLVED by the Governing Body of the City of Gulfport in regular public meeting duly assembled in the City of Gulfport, that the City of Gulfport, through its Comptroller, shall pay back from the moneys in said municipal employees retirement fund to each employee and/or former employee who made contribution thereto, the amount of his contribution; and that the City of Gulfport out of the same funds shall pay back to the general funds of the City of Gulfport the amount of the contributions that the City of Gulfport has made to said fund."

In view of the foregoing, in my opinion the above question is answered as follows:

On the basis of the laws involved and statements, determinations and actions of the governing body of the City of Gulfport, Florida, it appears that the pension fund or system established for said city by Ch. 24543, Laws of 1947, has, from a constitutional and otherwise legal standpoint, been validly dissolved.

August 27, 1954.—054-209.

**MUNICIPAL COURTS—DRUNKEN DRIVING—DRIVERS'
LICENSES—JURISDICTION—CLERMONT, CITY OF**

QUESTIONS: 1. Does §322.25(2), F. S., give power to the municipal courts to try and upon conviction fine and suspend or revoke the driver's license of one convicted of driving while intoxicated?

2. Does the State of Florida directly grant to its municipalities the jurisdiction to prosecute, and upon conviction fine or imprison those individuals found guilty of driving a motor vehicle without

a state license, or while their state driver's license has been suspended or revoked?

3. If the state does not grant such direct power, would an ordinance passed by the municipality governing such an offense be legal?

4. If the above ordinance be legal, what are the minimum and maximum fines which can be imposed?

To: *Honorable F. S. Bliven, Municipal Judge, City of Clermont, Clermont, Florida:*

Under Ch. 322, F. S., the only direct power a municipal court has is included in §§322.25, 322.26, and 322.27. All three of these sections make it mandatory that a municipal court require the surrender of a driver's license from a person convicted, in the municipal court, for specific crimes outlined in the section. However, because these same statutes give this duty to the municipal court, it can not be said that this duty also gives to the municipal court trial jurisdiction of the enumerated crimes.

The jurisdiction of a municipal court is limited by the State Constitution. Section 34, Art. V, of the Florida Constitution, provides in part:

"The Legislature may establish in incorporated towns and cities, courts for the punishment of offenses *against municipal ordinances.*" (Emphasis supplied.)

From this, it follows, that the only jurisdiction a municipal court may have, must emanate from an ordinance passed by its municipality.

The first and second questions, based on the above discussion, must be answered in the negative.

Even though a municipal court can not punish for the violation of a state law, it can exercise jurisdiction over a similar or same violation, if the city has enacted an ordinance which makes the violation punishable. Of course, such ordinances cannot be inconsistent with the Constitution and laws of the United States or the Constitution and laws of the State of Florida, and are limited to the powers given such cities by the Legislature.

Under Ch. 8926, Special Laws of Florida, 1921, the Legislature gives the City of Clermont the specific power to prohibit, by ordinance, certain enumerated activities such as gambling houses, exhibitions or shows contrary to good morals, etc. It also gives the City Council power to regulate by ordinance certain products and businesses. The general power, as stated in the special law, §32, is as follows:

"... to pass all ordinances necessary to health, peace, convenience and good order, and protection of the citizens, and to carry out to the full extent and meaning of this Act, and to accomplish the objects of this corporation."

Also, in §74 of the same Act:

"The City of Clermont shall have all the rights, powers and privileges granted all municipalities in the State... under the General Laws of the State... which are not in conflict with the provisions hereof."

Admitting that the City of Clermont does not have the specific power to pass an ordinance controlling the driving of motor vehicles without the proper state license, the issue would now seem to be, does the City have the necessary general power to enact such an ordinance, notwithstanding the same Act constitutes an offense against state law?

Other than the Chapter powers heretofore referred to, §165.19, F. S., provides as follows:

"The city or town council may pass all such ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals, for the suppression of riots and disorderly assemblies and for the order and government of the city or town, and to impose such pains, penalties and forfeitures as may be needed to carry the same into effect. Provided, that such ordinances shall not be inconsistent with the Constitution and laws of the United States or of this state: and provided, further, that for no one offense made punishable by the ordinances and laws of said city or town shall a fine of more than five hundred dollars be assessed, nor imprisonment for a period of time greater than sixty days."

Our court has held that this general power under §165.19, *supra*, clothes municipal governments with sufficient legislative authority to create by ordinance an offense as against municipal law out of the same act that already constitutes an offense against state law. (*State v. Quigg*, 154 Fla. 448, 17 So. 2d 697). The court also said:

"... and the conviction or acquittal by the one will be no bar to prosecution and punishment by the other. *Hunt v. City of Jacksonville*, 34 Fla. 504, 16 So. 398; 43 Am. St. Rep. 214, and *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; *Bueno v. State*, 40 Fla. 160, 23 So. 862."

In *Orr v. Quigg*, 185 So. 726 (Fla. 1938) the court decided that the City of Miami's ordinance numbered 319, which was entitled "An Ordinance to Forbid and Punish any Act Within the City Limits Which Shall be Recognized by the Laws of Florida as a Misdemeanor," was valid. In this case, the general powers which Miami had to enact the above ordinance were similar to those given to the City of Clermont. [See also *Stocks v. Lee*, 198 So. 211 (Fla. 1940)].

Therefore, it is my opinion that the City of Clermont has the necessary power and authority under the general statute, §165.19, and under the general power of Ch. 8926, Special Acts of Florida,

1921, heretofore cited, to enact ordinances regulating traffic and control of motor vehicles, not inconsistent with state laws, upon its streets and thoroughfares. This is particularly illuminated by a consideration of §322.25(2), F. S., which provides as follows:

"Every state or *municipal court* having jurisdiction over offenses committed under this Chapter, or any other chapter of this State regulating the operation of motor vehicles on highways, shall forward to the department a record of the violation of any said laws, and shall suspend or revoke in accordance with the provisions of this chapter, the operator's or chauffeur's license of the person so convicted." (Emphasis supplied.)

From the foregoing, question number three is answered in the affirmative.

Question number four is answered by §165.19, F. S., *supra*.

POLICE POWERS OF MUNICIPALITIES

February 2, 1954.—054-21.

MUNICIPALITIES—POOL ROOMS—PROPOSED ORDINANCE PERMITTING MINORS TO VISIT

QUESTION: May a municipality properly pass an ordinance which permits minors to visit places where pool or billiards are played, thereby conflicting with §849.06, F. S., which prohibits such persons from playing the games or visiting or loitering therein?

To: *Honorable O. Ralph Matousek, City Attorney, Homestead, Florida:*

You direct attention to §168.07, F. S., which grants to the city the right to regulate, among other places, "billiard saloons". We assume there are no charter provisions or special acts which affect the question.

37 Am. Jur., §165, page 787, states that it is fundamental, municipal ordinances are inferior and subordinate to those of the state, and an ordinance in conflict with a state law, state-wide in application, is invalid. See also 62 C. J. S., §143, page 287, stating that where there is a conflict between municipal regulations and the general law, the latter will ordinarily prevail. Stated in another way, is that in McQuillin Municipal Corporations, 2nd Ed., §949, page 115, where it is said if there is a state law relating to a subject, the municipality, in the exercise of its police power, must conform with such law.

While we do not find any Florida cases directly in point, we call attention to the case of *State ex rel Baker vs. McCarthy*, 122 Fla. 749, 166 So. 280, where the court held that the statewide statute permitting operation of coin operated machines rendered the provisions of a municipal ordinance prohibiting gambling, nugatory in so far as the ordinance applied to such machines. See also, the

case of *Curtis vs. Hutchinson*, 125 Fla. 440, 179 So. 136, which follows the same principle. It seems to me that the reverse of this situation must logically follow, that is, the municipality may not legalize that which has been declared illegal by a general legislative enactment. Were it possible for a municipality to sanction an act by ordinance, which the legislature, in the exercise of the state police power, determined is detrimental and contrary to public welfare, it would then be permitting a municipality to nullify established public policy.

The provisions of §168.07, if applicable to the City of Homestead, are, I believe, to be construed as permitting the municipality to regulate pool halls to the extent that its ordinances do not conflict with general state-wide statutes, public policy and welfare.

The question is accordingly answered in the negative.

FIREMEN'S RELIEF AND PENSION FUND

October 13, 1953.—053-269.

FIREMEN'S RELIEF AND PENSION FUND—TERMINATION OF RETIREMENT SYSTEM—DISPOSITION OF FUND

QUESTION: What lawful disposition may be made of monies accumulated by a municipality in its Firemen's Relief and Pension Fund, as contemplated by Ch. 175, F. S., when such retirement system has been abolished?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The question deals with the retirement system provided by Ch. 175, F. S. The request for opinion indicates that the municipality has elected to participate "in the Social Security Program for its Firemen". The question of the abolishment of such a fund in order that a municipality may be eligible to obtain old age and survivors insurance for its firemen in lieu of the system provided by Ch. 175, was dealt with by me in opinions 051-297 and 051-424 (1951-52 Biennial Report, 271-274). The latter opinion dealt further with the question of the disposition of funds authorized to be collected by a municipality in pursuance of §175.05, F. S. Copies of these opinions are attached.

A reading of these former opinions will demonstrate that as long as the retirement system provided by Ch. 175, F. S., is mandatorily applicable in any municipality, coverage under the expanded federal social security laws is not available. Whether the municipality here dealt with has effected a lawful discontinuance of the retirement system under said Ch. 175 is not known; hence, it is to be understood that this opinion deals solely with the subject matter, conditioned upon the lawful discontinuance of such system.

It is relevant here to take notice of the fact that among the sources for creating and maintaining the fund contemplated by Ch. 175, F. S., as set forth in §175.04 thereof, are the following: the net proceeds of the 1% excise or license tax authorized to be

levied by a municipality under the circumstances and conditions prescribed by §175.05, F. S.; and 2% of the salary of each fireman to the extent and as provided by §175.04 (2), F. S.

The question raises certain possible issues which cannot be settled with any degree of finality by an opinion of this office. These possible questions are here mentioned:

(1) It is assumed that this municipality has accumulated monies in the Fireman's Relief and Pension Fund from the sources provided by §175.04, F. S. It is further assumed that by virtue of the provisions of §175.01, F. S., the provisions of Ch. 175 are mandatorily applicable to said municipality. As long as the provisions of Ch. 175 are applicable to this municipality, reasonably it may be urged that, in the absence of superior statutory law, the city is powerless to use the monies accumulated in such fund for any purposes other than those set forth in the chapter.

(2) Conceding that under certain circumstances the municipality is authorized to abolish such a retirement system, if rights have accrued under the system in favor of any person, grave doubt exists that the funds accrued under the system may be used other than to satisfy or be applicable to such rights, as long as such rights are outstanding. In this state when an officer or employee has complied with the statutory prerequisites for retirement with pay, his right to retire and draw the retirement compensation becomes vested and cannot thereafter be revoked or impaired; it partakes of the attributes of a contract and in the absence of statutory reservations may not later be adversely changed, even by the Legislature. *Gay vs. Whitehurst, Fla.*, 44 So. 2d 430, text 432; *State vs. Lee, Fla.*, 2 So. 2d 127; *State vs. Lee, Fla.*, 24 So. 2d 798; *Anno. 137 A.L.R. 249, et seq.* It may be that even where such rights have accrued, if otherwise the system may be abolished, these rights may be surrendered by properly executed instruments by the persons who have such vested rights.

(3) It is to be noted that in former opinion 051-424 it is remarked that it may be that in pursuance of legislation, monies in such a fund lawfully may be diverted for other purposes, such statement being conditioned as set forth in that opinion. There is a further aspect to the validity of a law specifically diverting such monies to purposes other than as provided in Ch. 175. It is to be noted that where a municipality levies the 1% excise tax in pursuance of §175.05 F. S., the insurance company paying such tax is entitled to a credit on the state 2% excise premium tax levied by §205.43, F. S., (§175.09, F. S.) The effect of such an ordinance and such a credit is to divert to a municipality monies otherwise payable to the state. No question is here raised of the diverting of such funds for the purposes set forth in said Ch. 175. Notice is taken that a public activity may respond to a municipal, county, state or federal purpose or all may coalesce in the same activity and such does not inhibit said political subdivisions from contributing to that activity. *State vs. Gordon, Fla.*, 189 So. 437. Granting that there has been a dissolution of the retirement system

provided by Ch. 175 and that the funds raised in pursuance of §175.05, F. S., are no longer held for application to the purposes of Ch. 175, then the serious question arises as to whether such state funds so diverted to the municipality are subject to be re-funded to the State of Florida, since they have lost their combined state-municipal purpose.

(4) If there has been contributed to the fund 2% deductions from certain of the firemen of the municipality over the years, if the system has been abolished, then the serious question arises as to whether such contributions should be returned to those who, in effect, made them in pursuance of §175.04, F. S.

These questions can be settled with finality only in a proper proceedings with all necessary parties seeking a judicial construction of the provisions of Ch. 175, F. S., in relation to the several questions presented.

August 11, 1953.—053-197.

**MUNICIPALITIES—RETIREMENT SYSTEM FOR POLICE
OFFICERS—INSURANCE—PREMIUM TAX—METHOD
OF COMPUTING CREDITS AND DEDUCTIONS**

QUESTIONS: 1. What is the method of computing the tax, credits and deductions provided by Ch. 27989, Laws of 1953, in relation to casualty insurance companies, in view of the provisions of Ch. 28230, Laws of 1953, providing a retirement system for police officers of incorporated municipalities?

2. Where there is involved the question of credits against the tax imposed by subsection 205.43(2), F. S., as to fire companies by virtue of Ch. 175, F. S., or as to casualty companies by virtue of Ch. 28230, Laws of 1953, what constitutes "twenty per centum (20%) of the amount of the tax as determined under subsection (2) of §205.43, Florida Statutes", as such quoted words are used in the first proviso in subsection 205.432(1) in said Ch. 27989?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It is sufficient here to state that Ch. 27989 provides that when a foreign insurance company "which is subject to the tax imposed by subsection (2) of §205.43, F. S.", has established a regional home office in this state as therein provided, it shall be entitled to the following credits and deductions against such tax:

"(a) An amount equal to fifty per centum (50%) of the amount of the tax as determined under subsection (2) of said section; and

"(b) An amount equal to the full amount of all ad valorem taxes paid by such a foreign insurance company during the year next preceding the filing of the return required by subsection (3) of said Section 205.43: (i) upon any building and the land on which it stands in the State of Florida owned and substantially occupied by such for-

eign insurance company in the said tax year as a regional home office, together with any adjacent land as may be required for the convenient use and occupation thereof, and (ii) upon any property used in connection with the operation and maintenance of such regional home office;

provided, however, that in no event shall such credits and deductions reduce the amount of tax payable to less than twenty per centum (20%) of the amount of the tax as determined under subsection (2) of Section 205.43, Florida Statutes; and, provided further, that as to a foreign insurance company issuing policies insuring against loss or damage from the risks of fire or tornado, the tax imposed by subsection (2) of Section 205.43, Florida Statutes, as intended and contemplated by the above provisions of this subsection, shall be construed to mean the net amount of said tax remaining after there has been credited thereon such gross premium receipts tax as may be payable by such insurer in pursuance of the imposition of such tax by any incorporated cities or towns in this state for Firemen's Relief and Pension Funds maintained in such cities or towns, as provided in and by relevant provisions of Chapter 175, Florida Statutes."

Chapter 175, F. S., provides for a Firemen's Relief and Pension Fund in described municipalities in this State. It authorizes such a municipality to adopt an ordinance imposing an excise tax for such fund amounting to one per cent of the gross amount of receipts of premiums from policyholders on all premiums collected on fire and tornado insurance policies covering property within the corporate limits of such municipality (§175.05). Such tax is payable at the same time as the state tax imposed by §205.43(2); and it is provided that such tax shall not be additional to the state tax, but the payer of such municipal tax shall receive credit therefor on his said tax (§§175.06 and 175.09.)

Chapter 28230, Laws of 1953, provides a Police Officers Retirement Fund in certain described municipalities in this state. It authorizes such a municipality to impose on every insurance Company engaged in the business of casualty insurance, an excise tax amounting to one per cent of the gross amount of receipts of premiums from policyholders on all premiums collected on casualty insurance policies covering property within the corporate limits of such a municipality §5. Such tax is payable at the same time as the state tax provided by §205.43(2); but the tax imposed by said municipality shall in nowise be additional to such state tax, but the payer of the municipal tax shall receive credit therefor on his said state tax. It is remarked that Ch. 28230 became a law on June 15, 1953, and by §31 thereof became effective on July 31, 1953. Thus, it is to be observed that at the time Ch. 27989 became a law (April 14, 1953), Ch. 28230 was not a law.

We are thus confronted with a construction of Ch. 27989 in relation to certain provisions of Ch. 175; F. S., and Ch. 28230. It

is recognized that taxing statutes are to be construed strictly as against the state and liberally as to the taxpayer, *Lee v. Wood*, Fla. 170., 170 So. 433; but the reverse is true in construing statutes providing tax exemptions. *Stewart v. State*, Fla., 161 So. 378; *Lumus v. Florida Adirondack School*, Fla., 168 So. 232. But whether a strict or liberal construction is here involved, other rules of construction are applicable. Although the general rule of statutory construction is that the intent of the Legislature is to be found in the language used, if, however, from a view of the whole law or laws in *pari materia*, the evident intention is different from the import of the language used that intention should prevail. *Curry v. Lehman*, Fla., 47 So. 18; *State v. Johnson*, Fla., 72 So. 477; *Singleton vs. Larson*, Fla., 46 So. 2d 186. And that this rule is applicable to revenue laws is evidenced in state *ex rel Kurz v. Lee*, Fla., 163 So. 859, in which the court stated in effect that in dealing with finance and taxation measures passed by the Legislature, courts are impelled to look to the substance of the Legislative scheme in its practical operation and effect rather than to the mere form in which it has been contrived and enacted.

With these rules in mind, reference is made to certain wording in § 205.432 (1) in Ch. 27989:

A foreign insurance company "which is subject to the tax imposed by subsection (2) of Section 205.43 . . ."

"An amount equal to fifty per centum (50%) of the amount of the tax as determined under subsection (2) of said section; . . ."

" . . . provided, however, that in no event shall such credits and deductions reduce the amount of tax payable to less than twenty per centum (20%) of the amount of the tax as determined under subsection (2) of Section 205.43 . . ."

" . . . the tax imposed by subsection (2) of Section 205.43 . . . as intended and contemplated by the above provisions of this subsection, shall be construed to mean the net amount of said tax remaining after there has been credited thereon such gross premium receipts tax" as may have been paid to municipalities in pursuance of Chapter 175.

Notice is taken of the exact wording of certain of such quoted matter which refers to the tax as determined or imposed in pursuance of subsection (2) of Section 205.43. We have hitherto pointed out the credits allowable to insurers paying the taxes authorized by Ch. 175, F. S. and Ch. 28230. Had no mention in Ch. 27989 been made of taxes payable to Firemen's Relief and Pension Funds in the several municipalities in Florida, nothing in said chapter could have interfered with the payment of such tax; nor can Ch. 27989 interfere in any way with the payment of the tax which may be imposed under Ch. 28230. Hence, it would appear that the part of Ch. 27989 referring to the tax payable under Chapter 175, F. S.

was for the purpose of evidencing the legislative intent that the wording in §205.432 (1), referring to the tax imposed or determined under §205.43 (2) as to any insurer, was to be construed as the *actual state tax payable*. It is to be observed that in computing the tax payable by an insurer under §205.43 (2) it is necessary to ascertain taxes not only paid in pursuance of Ch. 175, F. S. but also under Ch. 28230. Thus, while of necessity to mention was made of the latter legislation in Ch. 27989, following the rules of statutory construction mentioned above, it reasonably appears that the premium receipts tax to be determined under subsection (2) of §205.43, as provided in Chapter 27989, requires a consideration of Ch. 175, F. S. and Ch. 28230, and, hence, a consideration of the actual amount of tax payable by an insurer under §205.43 (2) after there has been deducted therefrom the municipal taxes paid by an insurer as contemplated and authorized by the other legislation mentioned.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

(1) In applying the credits and deductions provided by Ch. 27989 as related to a casualty company the amount of state premium receipts tax contemplated by said chapter prior to any such credits or deductions shall be the amount thereof computed according to the provisions of §205.43 (2) less such amounts as any such insurer may be required to pay to municipalities in pursuance of relevant provisions of Ch. 28230.

(2) In view of the construction set forth in the preceding paragraph, it must follow that the twenty per cent of the amount of the state premium receipts tax which, by the provisions of Ch. 27989, under any event must be paid to the state, shall be construed to mean twenty per cent of such state premium receipts tax remaining after crediting thereon any taxes paid by an insurer to municipalities in pursuance of the relevant provisions of Ch. 175, F. S. and Ch. 28230.

POLICEMEN'S RETIREMENT FUND

February 18, 1954.—054-44.

MUNICIPALITIES—POLICE OFFICERS RETIREMENT FUND —DISPOSITION OF TAX REVENUE—CH. 28230, ACTS 1953

QUESTIONS: (1) Prior to the effective date of Ch. 28230, Laws of Florida, 1953, a non-profit corporation was organized setting up a pension or retirement system for police officers of a municipality, the municipality having no jurisdiction or control with respect to said corporation. May the municipality pay to said corporation tax revenue received in pursuance of ordinance under §5 of said Ch. 28230?

(2) Do any restrictions exist to a municipality paying into a retirement system for its police officers said tax revenue?

To: Honorable J. Edwin Larson, Insurance Commissioner:

We concluded our former opinion 053-256 with the following paragraph:

"The above-mentioned portions of the act, and generally the other provisions of the act, lead to the reasonable conclusion that while as to the incorporated cities or towns which have police departments of the nature defined in Section 1 of the act, the same is mandatory, there is excepted those cities and towns which heretofore have lawfully established police officers retirement funds or city funds providing pensions or relief benefits to policemen by whatever name known, in pursuance of specifically granted statutory power to create such a fund or funds or in pursuance of lawful ordinance or ordinances deriving from such a statutory grant of power. Such cities or town which heretofore have established and now maintain such a fund or funds are authorized to levy the tax provided by §5 of the act and have the advantage of other provisions of this chapter which do not conflict with the special pension plans heretofore established and provided in any such city or town."

We re-affirm that position. Subsequent to issuance of that opinion, it was called to our attention that in certain quarters it was felt that perhaps the statement was too broad. Since such opinion did not labor that question before stating the conclusion, relevant parts of Ch. 28230 in support thereof are now mentioned. Furthermore, such cited portions of the chapter are relevant to the above question.

Section 5 of Ch. 28230 provides, in part, that each "incorporated city or town in this state described and classified in Section 1 of this act, *as well as each other city or town of this state which at the time this act becomes effective, has a lawfully established police officers' retirement fund or city fund providing pension or relief benefits to policemen by whatever name known*" may assess the tax provided by said Section 5. (Emphasis supplied.)

Section 8 of Ch. 28230 provides that, "All funds received by any city or town under the provisions of this chapter, shall be by said town paid immediately into its municipal police officers' retirement fund *or into its pension fund for policemen, where such latter fund exists.*" (Emphasis supplied)

Section 28 of Ch. 28230 is quoted:

"This act shall not apply to any person who is or may become eligible to become a member of any other retirement system provided for by law, or of any retirement system provided for by any ordinance of any incorporated municipality of the state, nor shall this act, nor any provisions the thereof, be construed as limiting, modifying or enlarging any ordinance of any incorporated

municipality of the state, provided, however, this act shall apply to persons eligible for but who are not members of the retirement system provided for in chapter 182, Florida Statutes, provided further that nothing in this act shall be construed to bar cities that have adopted the social security plan advanced by the federal government."

We construe this very ambiguously worded section as follows:

(1) Where possible, a statute will not be construed so as to lead to absurd consequences or self-contradiction. *Curry vs. Lehman, Fla., 47 So. 18*; *City of Miami vs. Romfh, Fla., 63 So. 440*; *State vs. Sullivan, Fla., 116 So. 255*; *Haworth vs. Chapman, Fla., 152 So. 663*. Reasonably the provisions of said Section 28 are not to be construed as in any way nullifying the above-quoted underscored provisions of §5; that under the provisions of the act, cities and towns which at the effective date thereof had no retirement or pension system for their police officers and which fall within the purview of §1 of the chapter, are provided by the chapter with a complete retirement system for their police officers; that as to such cities and town which at the effective date of the act had a "lawfully established police officers' retirement fund or city fund providing pension or relief benefits to policemen by whatever name known", and which system was "provided for by law, or . . . by any ordinance", the provisions of Ch. 28230, other than §§5 to 10 thereof, both inclusive, do not apply, but that said §§5 to 10 relating to imposition and distribution of the tax provided thereby are applicable, as further explained by subdivision 5 of this paragraph. (Compare provisions of Ch. 175, F. S., relating to Firemen's Relief and Pension Fund, obviously the general pattern for Ch. 28230, particularly §§175.01, 175.05-175.10 and 175.26, F. S.) (2) A police officer who was a member of a retirement or pension system established by a municipality as aforesaid at the effective date of Ch. 28230 may not also be a member of the retirement system provided by the sections of said chapter, as distinguished from those mentioned sections dealing with the imposition and distribution of said tax, whether the tax levy authorized by §5 of said act is payable into such system for distribution or not, as explained below herein. (3) Since Ch. 182, F. S., was repealed by Chapter 26710, Laws of Florida, 1951, reference to it in said §28 is of no import. (4) The fact that a municipality has elected to place its police department under Federal Old Age and Survivors Insurance is no bar to such municipality also taking advantage of the retirement system provided by Ch. 28230. (5) Implicit in the purposes of Ch. 28230 is the principle that the proceeds of the levy authorized by §5 of said chapter may not be diverted to pay retirement or pension benefits to municipal officers and/or employees not police officers.

In view of the foregoing, in my opinion the above questions are answered as follows:

AS TO QUESTION 1:

The references in §§5 and 28 of Ch. 28230 to other retirement or pension systems for police officers contemplate systems created by municipalities under charter powers (i.e., under permissive legislation and/or ordinances in pursuance thereof relating to the establishment of such systems). Therefore, it does not appear that a retirement system for police officers created under the provisions of the charter of a non-profit corporation, as described in this question, is a retirement or pension system within the purview of said §§5 and 28. Conceding that position to be sound, the municipality is not authorized to pay to such corporation the tax levy derived from and distributed to the municipality in pursuance of the provisions of §§5 to 10, both inclusive, of said Ch. 28230. It is apparent that the conclusions set forth in the preceding paragraph are controversial. In relation thereto the following suggestions are made for the consideration of said municipality and its legal counsel:

(a) That the legal authority of the municipality to pay the proceeds of such tax levy to said non-profit corporation be determined and settled in a proper declaratory judgment proceeding; or

(b) On the theory that no other retirement or pension system within the contemplation of Ch. 28230 had been established by said municipality at the effective date of said chapter, that the municipality recognize that the retirement system provided by said chapter is in force in said municipality; or

(c) If neither of the foregoing suggestions is followed that the funds derived from said tax levy be held intact subject to such legislation as the municipal authorities may consider appropriate in connection with the disposition of such funds, to be sought at the next session of the Legislature.

AS TO QUESTION 2:

Where a municipality under authorizing legislation and/or ordinance in pursuance thereof, had in operation at the effective date of Ch. 28230 a police officers retirement or pension system, such municipality is authorized to deliver to the proper municipal controlling officer, officers, or board of such system funds realized and distributable under the provisions of §§5 to 10, both inclusive, of Ch. 28230.

Where a municipality at the effective date of such chapter had in operation under permissive legislation and/or ordinance in pursuance thereof a pension or retirement system covering city officers and/or employees, including its police officers, and where under such system proceeds payable thereto may not be "earmarked" for any particular class of employees, grave doubt exists that such municipality lawfully may pay into such system proceeds derived and distributable under Sections 5 to 10, both inclusive, of said chapter. It is recognized that the question involved in the

determination made in this paragraph is controversial. With that in mind these suggestions are offered for the consideration of a municipality with such a retirement system:

(a) It may be that under existing legislation there exists power in the municipality to provide that funds derived from the tax levy authorized by §5 of Ch. 28230 may be, by proper ordinance or other appropriate municipal action, paid into such system to be used solely for the benefit of police officers under said system; or

(b) Such a municipality, through its legal counsel, could obtain a judicial determination of the construction of the appropriate features of Ch. 28230 in relation to the question of the propriety of paying the proceeds of said tax into such a retirement system and be guided by such determination as might be made; or

(c) Should the suggestions made above be not followed by the municipality or result in no settlement of the question, the municipal authorities may hold the proceeds of such tax revenue intact until appropriate legislation might be sought at the next legislative session in relation to lawful distribution of the proceeds of such levy.

October 1, 1953.—053-256.

MUNICIPALITIES—POLICE OFFICERS RETIREMENT FUND
—LICENSE TAX—TYPES OF INSURANCE COVERAGE
INCLUDED CH. 185, F. S., 1953

QUESTIONS: (1) What types of insurance coverage are included in the words "an excise or license tax . . . amounting to one per cent of the gross amount of receipts of premiums from policyholders on all premiums collected on casualty insurance policies covering property within the corporate limits of such municipalities, respectively" as such words appear in §5, Ch. 28230, Laws of 1953?

(2) Where a municipality heretofore has provided in pursuance of statutory power a police officers retirement fund, may such municipality levy for such fund the excise tax in the amount and according to the method set forth in Section 5 of said Ch. 28230?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Chapter 28230 provides a retirement system for police officers of incorporated municipalities in Florida and creates a special fund for said system. Certain provisions of said chapter are here relevant.

Section 1 of the act provides in part and in effect that it is declared by the legislature that such police officers perform both state and municipal functions; that the legislature declares it is a proper and legitimate state purpose to provide a uniform re-

tirement system for the benefit of police officers as defined; that there is created a special fund to be known as the police officers retirement fund in each incorporated city or town of Florida which now has or which may hereafter have a regularly organized police department owning and using equipment and apparatus of a value exceeding \$500 in serviceable condition for the prevention of crime and for the preservation of life and property, and which city or town does not presently have established by law a similar fund.

Section 5 of the act provides in part and in effect that any such city or town described in §1, as well as each other city or town which at the effective date of the act has a lawfully established police officers fund or city fund providing pension or relief benefits to policemen by whatever name known, is authorized to levy an excise or license tax amounting to one per cent of the gross amount of receipts of premiums from policyholders on all premiums collected on casualty insurance policies covering property within the corporate limits of such city or town; that, "Every insurance company, corporation or other insurer paying such tax shall receive credit for the amount thereof, when paid, on the amount payable by such insurer to the State of Florida for the similar state excise tax now imposed by other provisions of law; provided, however, that this act shall not be construed to require the payment of an excise tax by an insurance company that does not now pay such tax."

Section 30 of the act provides that nothing therein shall be construed to repeal or amend any general or special law heretofore passed pertaining to policemen's pensions or pension funds for policemen.

Attention having been directed to said provisions of Ch. 28230, in view of such provisions and other parts of the act in my opinion the questions are answered as follows:

(1) The wording in §5 of the act that such cities or towns may levy for the purposes of such a fund an excise tax on premium receipts collected "on casualty insurance policies covering property within the corporate limits of such municipalities", is rather ambiguous in relation to the question.

"Although casualty insurance is a term of quite frequent use, it cannot be said that its definition has been very accurately settled by the courts. It is commonly held to include those forms of indemnity providing payment for loss or damage to property, except from fire or the elements, resulting from accidents or some unanticipated contingency, and for loss through accident, or casualties resulting in bodily injury or death. The term, however, is more properly applied to insurance against the effects of accidents resulting in injuries to property." 44 C.J.S., 475, §6 and cases in support cited in the footnotes. In 1945 our state legislature regulated by appropriate laws insurance rates in this state. For the purpose of such regulation the legislature saw fit to classify insurance into fire and related lines, as described in Ch. 629, F. S., and into casualty insurance, including fidelity, surety and guaranty bonds, as de-

scribed in Ch. 630, F. S. In the absence of any attempt in Ch. 28230 to define casualty insurance as used in §5 thereof, it seems reasonable to resort to those types of insurance described in said casualty rating law. The coverage dealt with in Ch. 630 is generally listed: automobile public liability and property damage; automobile collision; burglary and theft; plate glass; fidelity bonds; workmen's compensation; surety bonds; general liability (other than auto); boiler and machinery. At this point it is to be noted that the provisions of Ch. 630 are not applicable to the several forms of accident and sickness insurance, except workmen's compensation insurance and except public liability or personal liability insurance which provides medical reimbursement or medical coverage.

It is recognized that certain of the coverage mentioned as dealt with in Ch. 630, is not included in the general definition of casualty insurance quoted above. However, in addition to the classifying of all such coverage in one piece of legislation for rating purposes, attention is directed to certain general rules of statutory construction in an attempt to ascertain the legislative intent in its use of the quoted words in §5 of Ch. 28230. It is elementary that the intent of a statute is the law. *State v. Patterson, Fla., 65 So. 659*. Legislative intent is to be sought in construing a statute. *Davis v. Florida Power Company, Fla., 60 So. 759*. Courts must be guided by legislative intent notwithstanding it may appear to contradict the strict letter of the statute, and no literal interpretation should be given which leads to unreasonable or absurd consequences or results. *State v. Wentworth, Fla., 185 So. 357*; *Simmons v. State, Fla., 36 So. 2d 207*; *Smith v. Ryan, Fla., 39 So. 281*; *Foley v. State ex rel Gordon, Fla., 50 So. 2d 175*.

It is apparent that of the types of insurance dealt with in Ch. 630, F. S., but an inconsequential portion thereof is technically insurance on property, and the remainder is personal insurance indemnifying the person covered against possible claims for damages. If the quoted wording in Section 5 is to be given such a limited construction, then the "backbone" of the source of funds for a police officers retirement fund in at least certain of our cities and towns mentioned is broken. In other words, this construction would result in such limited revenue from the source contemplated by §5 of the chapter that the plan would be so crippled as to render doubtful its successful operation. It is presumed that the legislature intended no such result and, therefore, the quoted words in Section 5 of the act are susceptible of a construction which does not follow the strict language used. Such a construction is not only authorized but is permitted on the basis of the authorities of our Supreme Court mentioned in the preceding paragraph.

Applying such announced rules of statutory construction, there is yet another principle in relation to the purposes of Ch. 28230 and the types of coverage dealt with in Ch. 630, F. S. Attention has been directed to the provisions in §1 of Ch. 28230 to the effect that the duties of police officers in municipalities are related and vital to not only such municipalities, but also the public welfare of the state. Since there is permitted to an insurer by §5

of the act credit on the state premium tax to the extent that an insurer has paid the municipal tax provided by said section, looking behind the actual words and methods employed to the result accomplished, there is effected a diversion of state funds. No authority is required to support the principle that such diversion for strictly municipal purposes is prohibited. However, notice is taken that a public activity may respond to a municipal, county, state or federal purpose or all may coalesce in the same activity, and such does not inhibit such political subdivisions, any one or all of them, from contributing to the activity. *State v. Gordon, Fla., 189 So. 437*. Hence, it is that there must be some relationship between the type of casualty insurance contemplated by §5 of Ch. 28230 and police protection.

In view of the legal principles mentioned above and the apparent intent and purpose of Ch. 28230, it would seem reasonable that the types of casualty insurance coverage contemplated by §5 of said chapter are as follows:

- Automobile public liability and property damage
- Automobile collision
- Fidelity bonds
- Burglary and theft
- Plate glass

It is to be noted, in pursuance of such announced principles, that there are excluded the following types of coverage:

- Workmen's compensation
- Surety bonds of all types
- Accident and sickness
- General liability on property (other than automobile)
- Boiler and machinery

Of those types of coverage mentioned as contemplated by said §5, there appears to be only one which technically speaking is property insurance, viz., plate glass. Section 5 is further to be construed in relation to the other coverages contemplated by §5 as depending upon the residence or location within a particular municipality of the person, firm or corporation insured as to such other types of coverage.

(2) The above-mentioned portions of the act, and generally the other provisions of the act, lead to the reasonable conclusion that while as to the incorporated cities or towns which have police departments of the nature defined in Section 1 of the act, the same is mandatory, there is excepted those cities and towns which heretofore have lawfully established police officers retirement funds or city funds providing pensions or relief benefits to policemen by whatever name known, in pursuance of specifically granted statutory power to create such a fund or funds or in pursuance of lawful ordinance or ordinances deriving from such a statutory grant of power. Such cities or towns which heretofore

have established and now maintain such a fund or funds are authorized to levy the tax provided by §5 of the act and have the advantage of other provisions of this chapter which do not conflict with the special pension plans heretofore established and provided in any such city or town.

December 2, 1954.—054-257.

**MUNICIPALITIES—RETIREMENT FUND—POLICEMEN
AND FIREMEN—OASI—AMENDED SOCIAL
SECURITY LAW IN RELATION TO**

QUESTIONS: 1. In view of the provisions of Ch. 185, F.S., where, under described circumstances, agreements, etc., have been entered into whereby certain of our municipalities in this state have obtained OASI coverage for the members of their police forces subsequent to July 31, 1953, was such coverage permitted under the provisions of Title 42, U.S.C.A., §418 (D), prior to amendment thereof by Public Law 761, 83rd Congress, 2d Session?

2. What is a "policeman's or fireman's position" as such words are used in §101(h) (5) (A), Ch. 1206, Public Law 761, 83rd Congress, 2d Session? This question is particularly related to the following law enforcement officers in this state, mentioned in said request for opinion: Highway patrol; sheriffs and deputies; constables; county police and mounted patrol; prison captains (road and camp); prison guards; special police at state institutions and institutions of higher learning; investigators, Forestry Department; narcotic agents; wardens; Game and Fresh Water Fish Commission; shell and salt water fish conservation agents; motor vehicle inspectors; Railroad Commission inspectors; beverage inspectors or agents; firemen at state institutions or institutions of higher learning; firemen, Forestry Department.

To: Honorable Herbert W. Miller, Assistant General Counsel, Florida Industrial Commission:

Chapter 185, F.S. (Ch. 28230, Laws of 1953) created a police officers' retirement fund for those incorporated cities or towns in this state, heretofore or hereafter created, "which now has or which may hereafter have a regularly organized police department, and which now owns and uses or which may hereafter own and use equipment and apparatus of a value exceeding five hundred dollars in serviceable condition." Chapter 185 is quite similar in many respects to the provisions of Ch. 175, F.S. (Firemen's Relief and Pension Fund). Subject to the conditioning remarks hereinafter set forth, it would appear that the fund and the retirement system provided by Ch. 185 are mandatorily required in those cities and towns' falling within the above-quoted description.

Among other things, Ch. 185 specifies the sources of the mentioned retirement fund: the net premiums of the tax on casualty insurance premiums provided by \$185.08; five per cent of policemen's salaries; fines and forfeitures imposed or collected from policemen because of violation of rules or regulations of the board of trustees; tax millage; gifts, bequests, devisees; interest accretions to the fund; and monies derived from other sources now or

hereafter allowed by law (§185.07). Mentioned §185.08 authorizes each such city and town contemplated by the act to levy by ordinance a 1% premium tax annually on casualty insurance premiums payable on policies issued on property in the respective cities and towns. Section 185.31 provides that, "In the enforcement and in the interpretation of the provisions of this chapter, each municipality shall be independent of any other municipality and the board of trustees of the police officers' retirement fund of each municipality shall function for the municipality which they are to serve as trustees." Section 185.32 provides in part that the chapter shall not apply to any person who is or may become eligible to become a member of any other retirement system provided for by law; and further that the chapter shall not be construed to bar cities that have adopted the social security plan advanced by the federal government.

42 U.S.C.A., §418(D), prior to amendment thereof by above-described Public Law 761, provided in part that "no agreement with any state may be applicable . . . to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group." The phrase "retirement system" is defined for the purposes of Section 418 as "... a pension, annuity, retirement or similar fund or system established by a state or by a political subdivision thereof."

Subsequent to the effective date of Ch. 185, viz., July 31, 1953, we are informed that it was the opinion of legal advisers of numerous of our incorporated cities and towns that the retirement system provided by Ch. 185 did not become effective in their respective municipalities until by resolution or ordinance the governing body of the city or town had officially declared itself subject to the provisions of the act; had adopted the ordinance required by §185.08 to insure payment to the municipality of the tax on premium receipts, which is recognized by all informed persons as the chief intended source of funds for the retirement system; had set up books and records required for the orderly establishment of a retirement system in relation to the members of its police force; and had started to deduct from the members of its police force the 5% of their salaries for the retirement fund. As result of such conclusions, heretofore accepted by counsel for the "State Agency", as contemplated by Ch. 650, F.S., agreements have been entered into resulting in numerous incorporated towns and cities in Florida obtaining OASI coverage for members of their police departments since the effective date of said Ch. 185.

Heretofore this office has held that where a municipality levied the tax on premium receipts authorized by §175.05, F.S., for their respective firemen's relief and pension funds, they could not by ordinance, if otherwise they came within the purview of Ch. 175, abolish the fund created by said chapter; and further, where such had been done and monies from said source had been and were being collected, such a municipality could not obtain OASI coverage for members of its fire department (Opinion 051-297, 1951-52 Biennial Report, 271; Opinion 051-424, 1951-52 Biennial Report, 272). Subsequent to the enactment of the law which now appears

as said Ch. 185, we issued opinion 053-256 of October 1, 1953, and opinion 054-44 of February 18, 1954, relating to certain aspects of said chapter. Further, on May 12, 1954, in a letter to the Insurance Commissioner, we held that a city employing only one policeman who had elected not to accept the benefits of Ch. 185, was not authorized to levy the 1% premium receipts tax provided by §185.08. None of the positions assumed in these previous opinions and letter are in conflict with the conclusions set forth in the succeeding paragraph hereof.

While the provisions of Ch. 185 are mandatorily applicable in those cities and towns described therein, there is required action on the part of such a municipality to inaugurate the retirement system provided thereby. This is not a pension system; it is a retirement system which requires some degree of actuarial soundness. The activation of such system requires determination by a municipality that it is subject to the act; proper functioning of the designated trustees; the maintenance of books and records; the actual establishment of the retirement fund account and collection of funds from the mentioned sources for such account. As far as members of a police force are concerned, until such positive action has been taken, no retirement system exists for any practical purpose; and until such positive action is taken by such a municipality, it cannot be said that the members of its police department are members of a "group in positions covered by a retirement system", as such words were used in 42 U.S.C.A., Sec. 418(D), prior to its aforesaid amendment. Furthermore, in those instances where such cities and towns have obtained OASI coverage for members of their respective police departments, we are informed that such has been the result of interpretation of Ch. 185 in relation to the mentioned federal laws by legal advisers of such municipalities; and we take notice of the quoted provisions of §185.31 in this respect.

Attention is now directed to the second question. Above-mentioned Public Law 761 constitutes a further extension of coverage under OASI, included in which is coverage for employees now covered by state or local retirement systems to the extent set forth in subsection (h) of said law. Among the other provisions of said law is that set forth in subdivision (5) (A) of said subsection (h):

"Nothing in paragraph (3) of this subsection shall authorize the extension of the insurance system established by this title to service in any policeman's or fireman's position."

Attached to the request for opinion in relation to the second question is a photostatic copy of a memorandum from the office of the General Counsel of the federal department charged with administering OASI, to the Regional Director, Atlanta, Georgia, attention of the office of the Regional Attorney. The memorandum dealt with an inquiry arising in the State of Alabama concerning the interpretation of the words "policeman's or fireman's position" in said paragraph (5) (A). A copy thereof is hereto attached.

Serious consideration of such memorandum leads to these conclusions: (1) The quoted words in this question are to be given

their statutory definitions, if such exist. (2) In the absence of such statutory definitions, the status of the mentioned enforcement officers in relation to said quoted words, "depends entirely upon a construction of the statutes creating such positions." (3) The fact that counsel for the mentioned federal department declined to construe the quoted words in relation to certain Alabama positions indicates that the proper legal authority in each state is charged with such construction. Hence it is that we deal with the construction of these words in this federal statute and apply rules of statutory construction thereto as though we dealt with state legislation.

The *police of the state* is "the function of that branch of the administrative machinery of government charged with the preservation of public order and tranquility, the promotion of the public health, safety and morals, and the prevention, detection and punishment of crimes." See *Black's Law Dictionary*, 3rd Ed., page 1372. The Oregon court in *Canal Commissioners vs. Williamette Transp. Co.*, 6 Or. 222, quoted the following from the works of Jeremy Bentham: "Police is in general a system of precaution, either for the prevention of crimes or calamities. Its business may be distributed into eight distinct branches: (1) Police for the prevention of offenses; (2) police for the prevention of calamities; (3) police for the prevention of epidemic diseases; (4) police of charity; (5) police of interior communications; (6) police of public amusements; (7) police for recent intelligence; (8) police for registration." See also definition of "Police", 72 C.J.S. 206; also *Cooley Constitutional Limitations*, Section 572.

Now obviously in a broad sense any public officer or employee charged with execution of laws or regulations in the mentioned fields in the administrative branch of the state is a police officer. For example, in 901.21, F.S., relating to search of a person, we find the words, "When any sheriff, deputy sheriff, or other police officer..." No time is consumed in search for other examples no doubt to be found in our statutes. However, the quoted words in this question must be considered in their context and in relation to the subject matter of *coverage*, both OASI and the retirement systems in this state.

Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has the right to rely on ordinary words addressed to him. *Addison vs. Holly Hill Fruit Products*, 322 U.S. 607, 88 L. Ed. 1488, remanding *Holly Hill Fruit Products vs. Addison*, 136 F. 2d 323. The meaning of legislation must primarily be determined from the language of the act itself, considered in its ordinary and grammatical sense; and when such can be ascertained, rules of statutory construction become unnecessary. E.g., *Escambia County vs. Blount Construction Co.*, Fla., 66 So. 650; *State vs. Tunnicliffe*, Fla., 124 So. 279; *Maryland Casualty Co. vs. Sutherland*, Fla., 169 So. 697; *State ex rel Harris vs. King*, Fla., 188 So. 122; *State ex rel Southern Roller Derbies vs. Wood*, Fla., 199 So. 262.

"Police Officer" is defined in *Black's Law Dictionary*, 3rd Ed., page 1373: "One of the staff of men employed in cities and towns

to enforce the municipal police, i.e., the laws and ordinances for preserving the peace and good order of the community. Otherwise called 'policemen'." See also definitions of "Policeman" in 32 *Words & Phrases*, page 723.

As we have noted above, the words "policeman" and "fireman" as used in this federal legislation are to be considered in relation to existing retirement systems. As mentioned, our Legislature has created retirement systems for organized firemen and policemen in certain of our municipalities. In the retirement systems created for state and county officers and employees (as distinguished from those systems for Florida Highway Patrol, Circuit and Supreme Court Judges, and teachers) officers and employees engaged in executing the police power of the state in the fields of apprehension for the commission of crimes, the fighting of fires, the detection of felonious fires, the execution of our health laws and other police regulations, have been integrated into such systems. For the purposes of such two retirement systems and those others specifically mentioned in the preceding sentence, none of such officers and employees covered thereby are or have been considered "policemen" or "firemen".

There is this further thought. There is already being considered in connection with such described systems for state and county officers and employees a possible bolstering of such systems for actuarial purposes by accepting certain OASI coverage for the members of such systems. If the words "policeman" and "fireman" as used in the federal act are to be given other than their readily understood meaning, and are to be enlarged to include hundreds of positions now integrated into the state and county systems, it is readily conceivable that such might result in complications which would preclude any program looking to additional or supplemental coverage under OASI.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) While Ch. 185, F.S., mandatorily requires the setting up of a policemen's retirement system in those incorporated cities and towns described therein, no such retirement system for any such municipality is actually established therein until the governing body of that municipality has determined that it is subject to the chapter and has taken other positive action required by the law or recognizing that it is subject to the law. Hence, in those instances where the governing bodies of cities and towns subsequent to July 31, 1953, had taken no such positive action, had interpreted Ch. 185 and Title 42 U.S.C.A., §418(D), prior to its aforesaid amendment, as permitting OASI coverage for members of their respective police force, and had obtained such coverage, such action was not in conflict with the mentioned federal law but was permitted thereby.

It is to be noted that question was also asked concerning the regularity under the mentioned federal legislation and Ch. 175, F.S., of instances where municipalities had obtained OASI coverage for members of their respective fire departments, under like circumstances above set forth in relation to coverage for members

of police departments. There is such a similarity in the provisions of Ch. 175 and 185, F.S., that the above discussion and conclusions in relation to police officers under Ch. 185 is applicable to firemen under Ch. 175.

(2) "Policeman" and "fireman", as such words are used in §101(h) (5) (A), Ch. 1206, Public Law 761, 83rd Congress, 2d Session, are to be construed as being limited to those persons who are members of regularly organized police and fire departments of incorporated cities and towns. With this conclusion, it becomes unnecessary to detail each of the public positions described in this question.

CENSUS AND APPORTIONMENT

January 19, 1953.—053-9.

FEDERAL AND STATE CENSUS—MUNICIPALITIES— PLUMBERS—LICENSES—GULFPORT, CITY OF

QUESTION: Do the provisions of Ch. 469, F. S., relative to cities of "7,500 population or more" refer only to the population as established by the 1950 Federal census, or can a current accurate and reliable local census be taken in a municipality and used to determine the applicability of Ch. 469?

To: *Honorable Harold J. Soehl, Attorney, City of Gulfport, St. Petersburg, Florida:*

Chapter 469 F. S., relating to licensing of plumbers, is made applicable to §469.01, et seq., only to cities of "7,500 population or more," without indicating the basis for computing such population. You ask in your letter whether the 1950 Federal census, which reveals the city of Gulfport to have a population somewhat less than 7,500 persons, must control the applicability of Ch. 469, or whether a current accurate and reliable local census can be taken, and, if showing a population in excess of 7,500 persons, applied to permit the city to come within the provisions of the law.

Your inquiry seems to be specifically answered by the provisions of §1.01 (9), F. S., which provides as follows:

"Reference to the population or number of inhabitants of any county, city, town, village or other political subdivision of the state, shall be taken to be that as shown by the last preceding official state or Federal census."

And, as provided in Art. VII, §5, of the Florida Constitution:

" . . . The last preceding decennial Federal census, beginning with the Federal census of 1950, shall also be the State census and shall control all population Acts and constitutional apportionments, unless otherwise ordered by the Legislature."

Accordingly, it seems clear that the applicability of Ch. 469, F. S., must be governed by the 1950 official Federal census, and that a current local census, even though accurate and reliable, would not be legally sufficient to authorize the City of Gulfport to come under the provisions of Ch. 469.

CHAPTER XIII

TAXATION AND FINANCE

GENERAL PROVISIONS

May 5, 1954.—054-111.

TAXATION—LANDS—RELIGIOUS OR ELEEMOSYNARY CORPORATION OWNERS—LEASES TO INDIVIDUALS— EXEMPTIONS

QUESTIONS: 1. May structures built by a lessee, upon lands leased by him from a religious or eleemosynary corporation for a term of years, be assessed for ad valorem taxes against the said lessee?

2. If such structure and lands are occupied by the said lessee as his permanent home in this State, is he entitled to homestead tax exemption thereon?

3. Is the personal property of the said lessee located in the said structure, including his household goods and personal effects, subject to ad valorem taxation?

To: Honorable P. G. Gearing, County Tax Assessor, Sebring, Florida:

"Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, except assessments for special benefits, up to the assessed valuation of five thousand dollars . . ." (§7, Art. X, State Const.). In this State, with certain exceptions not here material, all real and tangible personal property in this State is liable to county and local ad valorem taxation, unless held and used for some educational, literary, scientific, religious or charitable purpose (§1, Art. IX, and §16, Art. XVI, State Const.; §192.06, F. S.). Under these constitutional and statutory provisions ownership and utilization of the property are the criterion for determining its exemption from taxation (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummas v. Florida Adirondack School, Inc.*, 123 Fla. 810, 168 So. 232; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78). Ownership is not sufficient, there must also be utilization for one or more of the purposes mentioned in the Constitution.

Leasehold estates for a term of years (no matter how long) are deemed and considered to be personal property and not as real property (*Black's Law Dictionary*; 31 C. J. S. 16, §7; 73 C. J. S.

159, §7; and 33 Am. Jur. 460, §2); this being true the estate of the lessee is neither a legal title or beneficial title in equity to real property and, therefore, not within the purview of §7, Art. X, of the State Const. Such a leasehold interest should be taxed as tangible personal property (although a leasehold interest for the life of a person would be taxed as an interest in real property), as opinion 050-363 of July 25, 1950 (1949-50 Biennial Report 253). In this connection we enclose herewith copy of our opinion of March 16, 1954 (054-63) bearing upon certain phases of the above questions, or one or more of them.

Where the lease is for a term of years the lessee could not be granted homestead tax exemption, because the leasehold interest being personal property it would not be within the purview of the homestead tax exemption amendment. Whether the structure becomes a part of the real property or is the tangible personal property of the lessee depends upon the intention of the parties as reflected by their agreement; in the instant case we feel that the structure became a part of the realty and may not be assessed separately. Any tangible personal property of the lessee on the premises would be subject to taxation as property of its owner as other tangible personal property, unless entitled to exemption as household goods and personal effects or otherwise.

The above stated questions are answered as follows:

1. The leased property (unless by agreement the structure does not become part of the realty) is subject only to tangible personal property tax to be paid by the lessee and cannot be assessed as real property belonging to the lessee.
2. A person making his permanent home upon a leasehold estate for a term of years is not within the purview of the constitutional provision for homestead tax exemption, and the second question is answered in the negative;
3. The third question is answered in the affirmative; unless exempt under some express statute or law.

July 19, 1954.—054-176.

TAX EXEMPTION STATUS—INSTITUTIONS AND CORPORATIONS TEACHING AVIATION

QUESTION: Is an institution or corporation engaged in teaching aviation and the art of piloting aircraft within this State entitled to ad valorem tax exemption?

To: *Hon. C. M. Gay, State Comptroller:*

Under the State Constitution (§1, Art. IX, and § 16, Art. XVI) and the F. S. (§192.06) real and personal property held and exclusively used for educational purposes appears to be entitled to ad valorem tax exemption. The Florida Adirondack School (Lum-

mus v. Florida Adirondack School, 123 Fla. 810, 168 So. 232, text 234) was held entitled to tax exemption under said constitutional and statutory provisions notwithstanding it "was organized under the statutes providing for corporations for profit and its capital stock was fixed at one hundred shares of common stock of no par value," with its principal place of business in Miami, Dade County, Florida. The court's main concern was whether or not the property in question was held and used exclusively for educational purposes. It, therefore, seems that the fact that the owner and operator of an educational institution is a corporation for profit will not justify denial of tax exemption under the above constitutional and statutory provisions.

Property held and used exclusively for educational purposes would appear to be entitled to tax exemption under the statutes and laws of this State. For property to be held and used for educational purposes such use must be the primary use and not the secondary use of the said property. Whether or not a parcel of property is used primarily and exclusively for educational purposes is one of fact to be determined by the tax assessor from evidence before him. "Education" is a broad and comprehensive term with a variable and sometimes indefinite meaning (12 Words and Phrases 123-143; 38 Words and Phrases 305-310). Aviation has in recent years become a major industry and means of transportation so that doubtless the training of personnel in the arts of building, repairing, upkeep and operating aircraft has become a major educational purpose. Whether or not the teaching of aviation and piloting aircraft by a particular institution is educational is primarily one of determining whether the primary purpose of the training is education or not.

The above question is, therefore, answered in the affirmative where the teaching of aviation and the art of piloting aircraft is the, or one of the, primary purpose of the institution or organization.

April 12, 1954.—054-81.

HOMESTEAD TAX EXEMPTION—RECORDING OF TITLE— LIFE ESTATE

QUESTIONS: 1. May a person making his permanent home in this State be granted homestead tax exemption when his title to the homestead premises is not a matter of public record?

2. Where a person makes his permanent home in this State on property to which he owns and holds merely a life estate, may he claim homestead tax exemption based thereon, and if so, what is the measure of the value of the said tax exemption?

To: *Honorable C. M. Gay, State Comptroller:*

Under §7, Art. X, of the State Const., "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an ex-

emption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars . . . The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption." Although the Constitution requires that the homestead claimant have "the legal title or beneficial title in equity" to the real property claimed as his tax exempt homestead, we find nothing in the Constitution requiring that evidence of such title be a matter of public record. Persons basing their title upon adverse possession without color of title might have good title to the homestead real property but would be without any record evidence of such title in the absence of court proceedings declaring such title in them. The only requirement for record of the evidence of title to homestead as a condition to granting homestead tax exemption is that found in §192.13 F. S., requiring that contracts for the sale or purchase of real property be matters of record; we find no like requirement as to other types of evidence of title to homestead property.

Although it is recognized that requiring that the homesteader's evidence of title to the homestead be matters of public record may be desirable, we find no such requirement in the State Constitution or statutes, except as to contracts above mentioned. It is the duty of the Tax Assessor, both under the Constitution and under the statute, to determine the right of the applicant for the exemption; included in this duty is the determination of the actual residence on the property and the making of it the permanent home of the person claiming the exemption, as well as the ownership of the property by the claimant. In this connection there might well arise the question of the actual ownership of the title by the petitioner, which in turn might involve the bona fides of the title instrument under which the claimant purports to hold title. In this connection the record or non-record of such title instruments might have a bearing upon the final determination by the assessor. However, where there is no doubt as to the bona fides of the title instruments the want of record cannot and should not defeat the right of the claimant to the exemption.

The first question is, therefore, answered generally in the affirmative. However, the Tax Assessor has the right to demand from the claimant proof of the bona fides of the title instruments not of record and should be satisfied of their bona fides.

Under the common law and the laws of this State a person seized and possessed of a life estate in real property holds a legal title to real property, although the holder of a lease or other title for a fixed term of years holds merely a chattel real or personal property. Such a life estate will support a claim for homestead tax exemption, although an estate for a term of years will not. After a life estate has been carved out of the fee title to real property, there remains the balance of the estate or the remainder; both the life estate and the remainder have separate values. The value of the life estate on any particular day depends upon the value of the property measured by the life expectancy of the life

tenant. A life estate may be compared to the common law dower estate of a wife in the real estate owned by her deceased husband at the time of his death.

Such an estate is capable of present valuation (28 C. J. S. 216, Section 103) although the methods of computation seem difficult. The two estates appear to be capable of separate valuation; this being true, the life estate may be subject to homestead tax exemption with the remainder being subject to taxation. In such a case separate valuations must be made for both estates, with the life estate being subject to homestead tax exemption upon its own separate valuation under the usual limitations. These observations seem to answer the second question as well as it may here be answered.

June 10, 1954.—054-139.

TAXATION—INTANGIBLE PERSONAL PROPERTY— CORPUS OF TRUST ESTATE—EXEMPTIONS

QUESTION: Where intangible personal property is held in this State by a trustee with the income therefrom being used by cestui que trustent for some educational, literary, scientific, religious or charitable purpose, is the corpus of such estate entitled to ad valorem tax exemption in this State?

To: Honorable C. M. Gay, State Comptroller:

Under some of the trusts in question the corpus becomes a perpetual one, with the income therefrom being used for some tax exempt purpose; under others the corpus of the trust is held by the trustees with certain fixed annuities being paid from the income thereof during the life or lives of persons in being, the corpus of the trust passing to the tax exempt association upon the death of the cestui que trustent; and under others the corpus of the trust remains under the supervision and direction of the donor, who may even take down the corpus and end the trust at any time, with only the income of the trust going to a cestui que trust. In each of the above cases the income once it passes to the cestui que trust must be used for the designated educational, literary, scientific, religious or charitable purpose within the purview of §192.06, F. S., §1, Art. IX, or § 16, Art. XVI, of the State Consti., and is exempt under said statute and constitutional provisions from ad valorem taxation. Our question involves the status of the corpus of the estate under our tax exemption statutes and laws.

Under §1, Art. IX, of the State Consti., the Legislature is authorized to exempt property from taxation which is used for some educational, literary, scientific, religious or charitable purpose, and §192.06, F. S., provides exemption for such property when so used. Under §16, Art. XVI, of the State Consti., property held by a corporation and used exclusively for such purposes is granted constitutional exemption. Where tangible personal property is held in trust for use by a tax exempt association (as distinguished from use of the income therefrom) such property would appear to

be entitled to tax exemption in this State (see 84 C. J. S. 549 and 550, §282.) "Under constitutional or statutory provisions granting exemption with respect to property used exclusively or solely for charitable purposes, exemption will be granted where the charitable use is exclusive, and denied where it is not . . ." (84 C. J. S. 555, §282.) "Except where statutes have a different effect, it is ordinarily held that property owned by a charitable institution and used as a source of income or profit is not exempt despite the application of the income to charitable purposes." (84 C. J. S. 559, §282.) Section 192.06 (3), F. S., appears to adopt a different rule as to buildings owned by charitable, etc., association when not more than seventy-five per cent thereof is rented and the rents, issues and profits thereof used for some charitable, etc., purpose. This statutory provision does not seem to apply to intangible personal property. "It is the direct and immediate use of the property, and not the use of the income therefrom, that is determinative of whether the property is used for tax-exempt purposes" (Christian Business Men's Committee v. State, 228 Minn. 549, 38 N. W. 2d 803, text 809). "The property physically used in the work of the institution is exempt; the property in which the funds of the institution are invested is not exempt, although the income is used exclusively for carrying on the institution." State v. City of Nashville, 178 Tenn. 344, 157 S. W. 2d. 839.) "In the absence of constitutional or statutory provision therefor, property and funds held as an endowment or trust for a religious institution may be denied exemption from taxation, although they have been held exempt as property used for religious purposes" (84 C. J. S. 596, § 291.) Endowments and trusts established for educational institutions have been held to be entitled to tax exemption, but in some cases to be non-exempt (84 C. J. S. 584, §288.)

In Florida National Bank v. Simpson, Fla., 59 So. 2d. 751, certain property was conveyed by will to trustees, including a large amount of intangible personal property in the form of stocks and bonds, placed by the will under their exclusive control and management, with certain portions of the income from said trust to be used for educational, literary, scientific, religious or charitable purposes. One of the cestui que trustent made and irrevocable 12% of her income under the trust to a charitable institution within the purview of §192.06, F. S., and §1, Art. IX, and §16, Art. XVI, of the State Consti.; however, neither the said cestui que trust nor the said charitable institution had any control over the corpus of the trust as such. It was held in this case that the devise of a portion of the income of the trust to a charitable institution did not vest in that institution any equitable beneficial interest in the trust res entitling it to tax exemption.

Unless the cestui que trustent have some power of appointment over the corpus, or future estate in the remainder of the trust estate, or present interest in the corpus of the trust estate, aside from their right in equity to compel the performance of the trust we do not think that the corpus of the trust estate is being used exclusively for some educational, literary, scientific, religious or charitable purpose. Such institutions do not now have and

may never have any interest in or control over the corpus of the trust estate, other than the right to receive income therefrom. The trustee itself is not an educational, literary, scientific, religious or charitable association. The corpus of the estate, not like a church house, school house, hospital, etc., held by a trustee for religious, educational, charitable, etc., use only, is not being actually used for some educational, literary, scientific, religious or charitable purpose, but only the income therefrom is being so used.

We are, therefore, of the opinion that the above question should be answered in the negative in the light of the Florida National Bank v. Simpson case and other authorities referred to. No attempt has been made to give specific answers to each of the trusts mentioned in your said letter, because we do not feel that we have been fully advised as to all the facts and circumstances in each case. The ultimate disposition of the corpus of some of the trust funds is not shown by record one, the Rollins College Annuity Trust, probably terminates with the corpus going to the college itself, and others seem to continue indefinitely.

June 14, 1954.—054-143.

TAX EXEMPTION—PROPERTY FOR FUTURE USE AS CEMETERY

QUESTION: Is property held by a cemetery association for future use as a cemetery, but which is now unimproved and unused, entitled to tax exemption in this State?

To: Messrs. Weinkle and Kessler, Attorneys for County Tax Assessor, Miami, Dade County, Florida:

We gather from your said request that the lands in question are held by an existing cemetery association in an unimproved state for future use as a cemetery when and if required for such purpose. The association evidently maintains a cemetery on adjacent lands and will, when the demand is great enough, improve the property in question and maintain a cemetery thereon. The use of the unimproved property for cemetery purposes may be several years in the future, however, the exact time when it will be needed for such purpose is now uncertain.

We find no provision in the Constitution and statutes of this State, other than that contained in subsection (4) of §192.06, F. S., expressly granting tax exemption to cemeteries and burial grounds. Subsection (4) §192.06, F. S., exempts "all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial." Properties of educational, literary, benevolent, fraternal, charitable and scientific institutions or associations are exempt from taxation when held and used exclusively for such purposes (§192.06 (3), F. S.; §1, Art. IX, and §16, Art. XVI, State Constitution). Tax exemption for cemeteries and burial grounds is favored upon grounds of public policy; one reason for such exemption being the difficulty of collecting a tax thereon, due to the impropriety of selling graves of the dead through

tax foreclosures and other process (51 Am. Jur. 612, §645). Cemeteries have been held entitled to tax exemption as Charitable institutions (Forest Hill Cemetery Company v. Creath, 127 Tenn. 686, 157 S. W. 412). "An exemption of cemeteries from taxation will apply to lands acquired and set apart for burial purposes and either actually in use therefor or intended to be so used, provided, in the latter case, some active measures have been taken to prepare the ground for use as a cemetery, but will not apply to lands not used or reasonably intended to the specified purposes" (84 C. J. S. 599, §292). "The setting aside of any acreage for cemetery purposes, whether commercial or eleemosynary, must be predicated on good faith; the acreage set aside or reserved for future use must not be disproportionate in extent to the population of the community to be served and the reasonable expectation of the service to be rendered. . . . It is held that the exemption of property of cemeteries does not apply to lands which is not even platted into burial lots, and in which there has been no burials . . ." (51 Am. Jur. 613 and 614, §646). The exemption extends not only to those parcels of land actually used for burial plots and graves but extends to those intended for early future use. (84 C. J. S. 599, §292). The exemption would seem to extend not only to the burial plots and graves but also to lands and buildings required for the proper care, maintenance and upkeep of the cemetery. (84 C. J. S. 601 §292). Where only a part of a tract of land has been divided into burial plots and lots and there is nothing to keep the owner from selling the remainder for other than cemetery purposes, only the portion divided into burial lots and plots should be granted exemption (National Cemetery Association of Missouri v. Benton, 344 Mo. 784, 129 S. W. 2d 842, 122 A. L. A. 893; see also State v. Ritschel, 220 Minn. 578, 20 N. W. 2d 673, 168 A. L. R. 274).

From the above and foregoing statutes, authorities and observations, the above question should in general be answered in the negative; however, there might be special circumstances, which should be ascertained and determined by the local taxing authorities, where tax exemption would be proper under the above rules. Exemption would be the exception and not the rule.

April 28, 1954.—054-104.

FLORIDA INLAND NAVIGATION DISTRICT ASSESSMENTS— AS CHARGES ON MURPHY ACT LANDS

QUESTION: Where a parcel of land coming to the State under the Murphy Act (Ch. 18296, Laws of Florida, Acts of 1937) was encumbered by special assessments of the Florida Inland Navigation District when it became vested in the State, are such assessments valid and existing charges against the said lands or may such assessments and the evidence thereof be cancelled as to such land?

To: *Honorable E. B. Leatherman, Clerk Circuit Court, County Court House, Miami, Florida:*

Assuming, but not admitting, that such liens are valid (United States v. Alabama, 313 U. S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327)

as such enforcement would in effect be a suit against the State, for which no provision has been made except in connection with the foreclosure of municipal taxes (§196.17-196-21, F. S.). After sale by the State the liens, unless inferior to the tax liens forming the basis for the Murphy Act title, would be subject to enforcement against their purchaser.

Under the terms of the Murphy Act title vested in the State "and every right, title or interest of every nature or kind whatsoever of the former owner of said property, or anyone claiming by, through or under him, or anyone holding a lien thereon, ceased, terminated and ended," (§192.38, F. S.); however, the above quoted provision has been held applicable only to those liens subordinate and inferior to the lien of ad valorem taxes and not to liens or claims of equal dignity to the lien of ad valorem taxes under §192.21, F. S., (*Bice v. Haines City*, 142 Fla. 371, 195 So. 919; *June Sand Company v. Devon Corporation*, 156 Fla. 519, 23 So. 2d 621; *Jackson v. Lake Worth*, 156 Fla. 452, 23 So. 2d 526). This brings us to the question of the priority of Inland Navigation District assessment liens as against ad valorem tax liens. The assessments of the district are in the nature of special assessments for benefits and are not ad valorem taxes (*State v. Latham*, 121 Fla. 486, 163 So. 890), the sole power and authority for the levy of which is to be found in Ch. 14723, Laws of Florida, Acts of 1931, as amended and supplemented (*Hansen v. State*, 131 Fla. 679, 179 So. 692). Tax liens are creatures of statute and are not recognized by the State Constitution and the intent to provide for a lien must clearly appear from the statute (*State v. Culbreath*, 140 Fla. 634, 192 So. 814) and a tax is not a lien even upon the property assessed unless made so by statute (*St. Petersburg v. Fiore*, 160 Fla. 106, 33 So. 2d 852). Under §192.21, F. S., all valid state, county and municipal taxes, as distinguished from special assessments, are liens upon the property assessed of equal footing (*City of Sanford v. Dial*, 104 Fla. 1, 142 So. 233).

Our examination of Ch. 14723, Laws of Florida, Acts of 1931, and enactments amending or supplementing the same, relating to the Florida Inland Navigation District, fails to reveal any provision giving district assessment liens equal in dignity with state and county taxes; as a matter of fact it is not clear from said enactments that such assessments even constitute liens against the lands assessed as against third persons and lien holders. In the absence of statutes fixing liens for such assessments, equal in dignity with state and county tax liens, we seriously doubt that such assessments encumber Murphy Act lands, either in the hands of the State or in the hands of those claiming by, through or under the said State. Be that as it may we know of no statute or provision of law providing for the cancellation of the liens or other evidence of such district assessments, even if it should be admitted that such assessments are not liens. These observations seem to answer the above question as well as it may be now answered.

March 5, 1954.—054-59.

TAXATION—HOMESTEAD EXEMPTION—

FIRE DEPARTMENT EMPLOYEE AT STARKE, FLA.—
ELIGIBILITY

QUESTIONS: 1. May a person acquiring real estate in this State, after the first day of January of any year, claim the same as a homestead and exempt from taxation for the year in which acquired?

2. Is "X", who works for the Fire Department in Starke, Florida, and is furnished living quarters above the fire station for himself and his family, entitled to homestead tax exemption on a place which "X" owns nearby and maintains as a home, and at which "X" spends his vacations and days off when off duty?

To: *Honorable Gene Long, Tax Assessor, Bradford County, Starke, Florida:*

Under §7, Art. 10 of the State Constitution, "every person who has the legal title or beneficial-title in equity in real property in this State, and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from taxation . . ." All real and personal property shall be subject to taxation on the first day of January of each year, and shall be a lien upon such property for the purposes thereof. (§192.04, F. S.).

Under this statutory provision the status of real estate, on the first day of January of any year, determines the person in whose name such real estate should be assessed and the right to exemption, and a person entitled to claim a homestead tax exemption on the first day of January is not deprived of such exemption because he subsequently sells and conveys his homestead before filing claim for the exemption. (*Simpson v. Hirshberg*, 159 Fla. 25; 30 So. 2d 912). Property purchased subsequent to January first, even though used as a home, is not exempt from taxation for that year unless the property qualified as a homestead on January first.

Section 192.15, F. S., as qualified by §192.57, provides that the application for homestead exemption shall be *substantially* in the statutory form. Although said form is couched in the present tense, its statements should be construed as referring to the facts as they existed on January first, not as they exist on the date the application is made.

In *Simpson v. Hirshberg*, *supra*, the Supreme Court of Florida held that where property was exempt from taxation as a homestead on January 1, 1945, the transfer of title on January 8, 1945, did not divest the property of its tax-exempt homestead character, notwithstanding that on April 1, 1945, the grantors applied to the city for tax exemption of the property for homestead tax purposes.

It seems, therefore, if the property in question was entitled to homestead tax exemption on January first, the owner of such property on January first may file a claim for the tax exemption, even after he divests himself of title thereto. However, the persons who acquire the real estate after the first day of January may not file a claim for tax exemption, notwithstanding that on January first the status of the real estate was such as would entitle the property to the tax exemption.

The first question should, we think subject to the foregoing observations, be answered in the negative.

When §7, Art. 10 of the State Const. was amended in 1938, §192.14, F. S., which remains unchanged, provided that the term "permanent residence" and words of like import (which would include permanent home) should not be "construed so as to require continuous physical residence on the property, but means only that place which the person claims the exemption may rightfully and in good faith call his home, to the exclusion of all other places where he may, from time to time, temporarily reside." The said amendment was doubtless adopted in the light of this statutory provision. Under the constitution and statutes of this State, relating to exemption of homestead from forced sale, "the temporary absence from the homestead . . . in search of health, pleasure or for business reasons, will not deprive it of the homestead status." (Hillsborough Investment Company v. Wilcox, 152 Fla. 889, 13 So. 2d 448, text 450; see also Collins v. Collins, 150 Fla. 374, 7 So. 2d 443, text 444; Matthews v. Jeacle, 61 Fla. 686, 55 So. 865; Murphy v. Farquhar, 39 Fla. 350, 22 So. 681; 40 C. J. S. 647 and 648, Section 166; 26 Am. Jur. 120, Section 194). To retain his homestead rights one leaving a homestead must in good faith intend to return at some future date; however, it is not essential that he should intend to return at any particular time in the future. (40 C. J. S. 645 and 646, Section 166). Such intention is to be gathered from the declarations of the homestead claimant, his actions and the surroundings and environment accompanying his absence. (40 C. J. S. 646, Section 166).

It was stated in *Clay's Committee v. Washington*, 183 Ky. 756, 210 S. W. 484, text 487, that "if the homestead is once acquired, the length of the time of absence from it is not material, but it must be temporary in the sense that it begins and continues with a fixed purpose on the part of the claimant of the homestead to return to the property and occupy it as a homestead." In *Gerhart v. Quick*, S. D., 209 N. W. 544, text 545, the court, speaking of a homestead claimant, said "he never acquired a homestead other than the one involved, and it did not appear that he did not intend to return thereto, and, aside from the fact of his absence, there was no evidence that he intended to abandon the same. Mere absence for a long period of time is not of itself sufficient to establish abandonment."

In *City of Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d, 529, Bailey owned a dwelling in which he and his family resided, ex-

cept from December to March, when he "rented this property for the so-called winter season." While the property was so rented he resided temporarily elsewhere, but as soon as the rental period expired returned to the property and resided thereon. Concerning this state of facts the court stated "here there is no question that appellee 'resided on this property and in good faith made it his permanent home.' He had no other. His temporary absence on January 1, when the City Assessor presumably made up his roll, did not violate any part of the Constitution. It may have transgressed some rule of thumb of the Assessor, but that is of no import. We held, in *Lanier v. Lanier*, 95 Fla. 522, 116 So. 867, that temporary absence from the homestead of the head of the family for health, pleasure or business reasons would not deprive the property of its homestead character. See also *Collins v. Collins*, 150 Fla. 374, 7 So. 2d 443; *Hillsborough Investment Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448."

There must be an intention, either express or to be implied from the facts in the case, to abandon the premises as a homestead before the owner thereof should be denied his claim to exemption. A temporary renting of a homestead is not an abandonment thereof where there is no intention to abandon the premises as a homestead, and no other homestead has been acquired, and this is true even when the homestead claimant moves from the state temporarily (40 C. J. S. 656, §175). A temporary absence from the homestead while holding an official position has been held to be no prima facie abandonment of the homestead rights (40 C. J. S. 647, Section 166, note 81). See also an opinion of this office of August 21, 1946 (1045-6 Biennial Report 286.)

Under the above and foregoing observations it is apparent the mere absence of one holding a city government job or position in Starke, Florida, or elsewhere, is not sufficient, in and of itself, to prove abandonment of such person's homestead in this state. The question of whether or not a person has abandoned his homestead so as to no longer be entitled to tax exemption thereon, or has established a homestead to which he is entitled to homestead exemption under §7, Art. 10 of the State Const., is one of fact to be determined by the tax assessor by the application of the above rules and regulations, as declared by the courts, to the facts in each case. It is the prerogative of the Tax Assessor to ascertain the facts in each case and measure them by the rules and regulations above set out for their determination. These observations answer the second question.

January 7, 1954.—054-2.

WIDOWS AND DISABLED PERSONS—PROPERTY EXEMPT FROM TAXATION—§192.06, F. S. APPLICABLE.

QUESTION: Where the facts and circumstances in any particular case are such that a person meets the requirements of §9, Art. IX, of the State Const., for either a widow's exemption or an exemption because of disability by reason of misfortune, may such person be granted both exemptions?

To: Honorable C. M. Gay, State Comptroller:

Section 9, Art. IX, of the State Const., provides in part that "there shall be exempt from taxation property to the value of five hundred dollars to every widow *and* to every person who is a bona fide resident of this state, and has lost a limb *or* been disabled in war or by misfortune." It seems evident that the word "and" was used in the conjunctive and the word "or" in the disjunctive. The exemption on account of disability may arise from the loss of a limb, disability by reason of war or disability by reason of misfortune. Widowhood alone is sufficient to entitle a person to the exemption as a widow. It seems that the constitutional provision contemplates one exemption because of widowhood and another because of misfortune. Doubtless the framers of the constitution felt that one widowed by the death of her husband was put to a disadvantage in meeting the responsibilities and requirements of life, as are also those persons who lose a limb or are otherwise disabled because of war or misfortune. A widow who is disabled is put to a greater disadvantage in this connection than a woman who is merely widowed by reason of the death of her husband.

In the light of the above and foregoing observations we feel that there are two separate exemptions provided for in §9, Art. IX, of the State Const., (one to widows and the other to those persons disabled within the purview of the said section) and where a person is duly qualified for both such exemptions, they may claim and be granted both exemptions. We feel that blindness is a disability, but whether it is occasioned by misfortune is a question of fact to be determined from all the facts and circumstances. It was stated in *Swetland v. Swetland*, 100 N. J. E. 196, 134 A. 822, text 829, that "one may be fortunate or unfortunate. If the latter he suffers a misfortune. One may have the good fortune to have good health, or may suffer the misfortune of ill health. Any unfortunate illness, whether mental or physical, is a misfortune . . ." We do not feel that old age and its disabilities is a misfortune within the purview of §9, Art. IX, of the State Const.

The above question, therefore, should be answered in the affirmative.

October 27, 1953.—053-288.

MUNICIPALITIES—CLAIMS FOR HOMESTEAD TAX EXEMPTION—CITY OF BRADENTON

QUESTIONS: 1. Where the tax day of the City of Bradenton, Florida, is the first day of July in each year, are homesteaders entitled to homestead tax exemption who were residing on the lands and making them their permanent home on July first of the tax year?

2. If the first question is answered in the affirmative, is it permissible for the city to grant such exemption after tax bills have been mailed during the month of October?

3. May the city require that evidence of the homesteader's title

to the property be of record in the office of the Clerk of the Circuit Court in the county as a condition to allowing the exemption?

To: Honorable Gordon B. Knowles, Jr., City Attorney, Bradenton, Florida:

Under the State Constitution "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person" shall be entitled to homestead tax exemption. The Constitution does not fix the time of occupancy, that being left to the Legislature to fix by statute. Although §192.16, F. S., as amended, requires that "each taxpayer who claims said exemption shall file . . . (his application therefor) . . . with the assessor on or before April first of each year," and failure to file within said time amounts to a waiver of such exemption, such section relates to county taxation and not municipal taxation.

Under §167.72, F. S., a person who files an application for homestead tax exemption with the county tax assessor is not required to file a like application with a municipality within the county; the municipal tax assessor is required to obtain from the county assessor a copy of such application and act upon it. Where the county and the municipal tax years are concurrent no difficulty is presented; however, where the tax years are different the matter is not so simple of solution. Although the county assessor accepts and approves the application and grants the exemption the municipal assessor is not by that act alone prohibited from re-examining the application and making his independent ruling thereon. Where, as in this case, the municipal tax day is July first, or some other fixed date, of the same year (the county tax day being January first), additional homesteads may be established after January first and before July first of the same year. The tax day of the City of Bradenton is fixed as of July first of each year (§22, Cha. 22219, Acts of 1943). The tax day is the date upon which the taxability of the property is to be determined and as of which its value for taxation is determined.

It is our opinion that where the tax day of a municipality is fixed by law as of July first of the tax year that the tax year runs from that date and the question of taxability or tax exemption is to be determined from that day. Under §167.72, F. S., there is raised a presumption that those residents of the municipality filing claims for homestead tax exemption with the county (between January first and April first of the tax year) will also be entitled to the municipal exemption, however, this presumption is prima facie only as to permanent occupancy of the home on July first of the same year. Although the municipal tax assessor is required to obtain copies of the homestead exemption claims filed with the county assessor he is not precluded from re-examining them and ascertaining whether the exemption status of January first still continues on July first next following.

We feel that those persons who establish homesteads in the municipality between January first and July first of the same year should be permitted to file applications for exemption directly with the municipal tax assessor and that such claims should be required to be filed within the time allowed for filing tax returns with the municipal tax assessor. Under the laws applicable to county tax assessments where the application is not filed within the time permitted for filing tax returns it comes too late and may not be allowed. It seems that the same rule should be applied to the municipality. These observations seem to answer the first question.

Where the application is filed in time and is denied by the county tax assessor a review of the action of the county assessor may be had before the county equalization board, but where the equalization board acts on the appeal, or where no appeal is taken from the action of the tax assessor, the assessment becomes final and may not be reconsidered or reviewed by the board of equalization after adjournment sine die. A like rule would seem to be applicable to municipal tax proceedings. It is unusual for county tax assessments to be re-examined or reviewed after the tax rolls have been delivered to the county tax collector, although errors may sometimes be corrected under §192.21, F. S. Whether or not §192.21, F. S., or some like or similar law, is applicable to the municipality is a local question for the municipal attorney. These observations seem to answer the second question as well as it may here be answered.

As to the third question we find no applicable state statutes expressly requiring that the title papers of the homestead claimant be of record in the county; however, it is the practice of tax assessors in several of the counties to require that they be of record as a condition to granting the exemption. So far as we are advised this question has not been passed upon by any court of competent jurisdiction. Whether or not there may be any charter provisions or municipal ordinances bearing upon this question is a local question for the city attorney. We have heretofore declined to render an opinion upon this question and feel that we should not answer the third question above stated.

April 9, 1953.—053-78.

**TAXATION OF EASEMENTS—COUNTY TAX ASSESSOR—
PUBLIC LIABILITY INSURANCE FOR MOTOR VEHICLES
USED IN OFFICIAL CAPACITY**

QUESTIONS: 1. Is a perpetual easement in real property created by deed and appurtenant to grantee's land taxable to the grantee?

2. Does a County Tax Assessor have authority to contract for public liability insurance for automobiles owned by him in his name and in his official capacity as county tax assessor where employees of the assessor use said automobiles in the business of

the assessor's office and for transportation to and from their homes?

3. Does a County Tax Assessor have authority to contract for public liability insurance for automobiles privately owned by deputy county assessors which automobiles are used by said deputy assessors when assessing property in the county?

To: Honorable Alan B. Kessler, Attorney at Law, Miami, Florida:

Unless expressly exempted from taxation, all real and personal property in this State shall be subject to taxation in the manner provided by law. (§192.01, F. S.). For the purpose of taxation "real property" shall be construed to include lands and all buildings, fixtures and other improvements thereon and when used in connection with taxation the terms "land" and "real estate" shall be construed as having the same meaning as real property above defined. (§192.02, F. S.). An easement is an interest in land and essential elements of "easements" are that they are incorporeal and are imposed on corporeal property, confer no rights to profits arising from such property, are imposed for the benefit of corporeal property and there must be a dominant and servient tenement. (*Burdine v. Sewell*, 92 Fla. 375, 109 So. 648; *J. C. Vereen & Sons, Inc., v. Houser*, 123 Fla. 641, 167 So. 45.) Incorporeal hereditaments, easements, and other rights in land, as distinguished from the ownership of the soil, may possess value and are taxable if the legislature so determines, but not otherwise; and it is ordinarily held that such special rights or interests in lands owned by another are not to be regarded as separately taxable to the persons exercising or enjoying the same. *But when an easement is carved out of one estate for the benefit of another, the market value of the servient estate is lessened, and that of the dominant estate increased, by the value of the easement, and the respective tenements should be assessed accordingly.* (61 C. J. 189; *Bancroft Investment Corporation v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167.) It would seem that the easement may not be taxed to the grantee separately, but that the value of the easement to the dominant land should be considered when the value of such is determined for tax purposes, and that the value of the servient land should, for tax purposes, be decreased accordingly.

The board of county commissioners of each county of the State of Florida having a population in excess of 325,000, according to the last preceding Federal Census is authorized, but not required, to carry any or all types of insurance in such amounts and against such risks as the board, in its discretion, may from time to time decide, for and in behalf of such board and/or the county, including, but not limited to, liability insurance against tort actions, and to pay from the appropriate funds of the county the premiums on such insurance. (§1, Ch. 27031, Laws of Florida, 1951.)

Insurance companies entering into insurance contracts with counties under §1 of said law shall not be entitled to the benefit of the defense of governmental immunity of the county by reason of exercising a governmental function in any suit brought against

the county. Immunity of the county against liability for damages is waived, in the case of insurance carried pursuant to §1 of said statute, only to the extent of liability insurance carried by the county. (§4, Ch. 27031, Laws of Florida, 1951.)

We think that automobiles purchased with excess fee funds of the office of any county tax assessor of any county are county automobiles even though titles to such automobiles are not in the name of the county but instead are in the name of the county tax assessor in his capacity as an official of the county, and that public liability insurance may be obtained for such automobiles by or with the approval of the board of county commissioners in counties having a population in excess of 325,000 according to the last Federal Census. We do not think, however, that a county tax assessor is authorized to purchase with excess fees of his office public liability insurance for automobiles, the titles of which are in said tax assessor's name in his official capacity as county tax assessor, without first obtaining the approval of the board of county commissioners.

We know of no theory under which a county tax assessor may contract at public expense for public liability insurance for motor vehicles owned by persons employed in his office, even though the owners use them in connection with their governmental duties.

We think, therefore, subject to the foregoing observations, that question 1 should be answered in the affirmative and questions 2 and 3 should be answered in the negative.

February 23, 1953.—053-43.

RELIGIOUS ASSOCIATIONS—REAL PROPERTY— TAX EXEMPTIONS—WAIVER

QUESTION: Does a religious association in this State waive its right to tax exemption under the state constitution and statutes by its failure to file a written claim therefor with the tax assessor?

To: Weinkle and Kessler, Attorneys at Law, Miami, Florida:

Under §1, Art. IX, and §16, Art. XVI, of the State Constitution, and §192.06, F. S., religious associations, as well as other types of associations therein named, are entitled to certain exemptions from taxation. For the purposes of this opinion we shall assume that the association is entitled to an exemption, under the above mentioned constitutional and statutory provisions, of certain of its real and personal property. The question is one of waiver and not right to exemption under the statutes and laws.

We find no requirement in either the Constitution or the Statutes expressly requiring that a religious association file a claim for the exemption of its real property from taxation, as is provided by §192.16, F. S., for those persons who claim exemption of their homesteads from taxation. It may be that §200.15 F. S., requires that such a claim be filed by those entitled to tax exemption under our tangible personal property taxing laws, although

we find no like requirement under our intangible personal property taxing statutes, or Ch. 199, F. S. "In general, any tax levied against exempt property is one levied for an unauthorized purpose, and any state, county or city general tax upon any property exempt from taxation is void (51 Am. Jur. 504, §497). "A constitutional provision declaring that certain classes of property shall be exempt from taxation is self-executing and *proprie vigore* (by its own force) exempts the property specified (61 C. J. 385, §385). The same rule would seem to be applicable to a statute of a like nature. Where no claim for the exemption is required to be filed under the laws applicable it does not seem that the failure to file a claim for exemption would waive the right to exemption (61 C. J. 408, §423). It is our understanding that it has been the usual practice in this State to allow such exemptions without requiring a formal claim therefor. The tax exemption under the statute is not made conditional or dependent upon the filing of a claim therefor.

The above question should, therefore, be answered in the negative, until there is some change in the statute requiring the filing of a claim.

TAX ASSESSMENTS AND TAX SALES

October 4, 1954.—054-229.

TAX DEED SALE—INVALID TAX SALE CERTIFICATE —REFUNDS

QUESTION: Where an application for a tax deed sale is, after the publication of the tax deed sale notice and the obtaining of a tax deed search, found to be based upon an invalid or void tax sale certificate, what refunds, if any, may or should be made to the said applicant for tax deed sale?

To: Honorable C. M. Gay, State Comptroller:

In this case the clerk of the circuit court, after the first publication of the tax deed sale notice, procured a tax deed search by an abstractor which search revealed that the lands purported to be described in the said tax sale certificate, as well as the preceding tax assessment and sale proceedings, were nonexistent; in other words, there was no such parcel of land in the county. This being true it was readily apparent that the tax sale certificate was invalid and void and that any attempt to issue a tax deed based thereon would likewise be invalid and void. There was no way for the clerk of the circuit court to know of the invalidity of the tax sale certificate until the report of the tax deed search was delivered to him.

Unless the description in a tax assessment or tax sale certificate is such that a surveyor may take that description and locate the lands purported to be assessed or sold, the said assessment and tax sale certificate is invalid (see *Inter-City Security Company v. Barbee*, 106 Fla. 671, 143 So. 791; *Brickell v. Palbicke*, 123 Fla. 508, 167 So. 44). The lands purported to be described in this case being nonexistent they could not be located by a sur-

veyor. The purchaser of the invalid tax sale certificate was not a bona fide purchaser, and, therefore, took the same with all its infirmities. (85 C.J.S. 322 and 351, §§905 and 913). The refund of taxes paid for an invalid tax sale certificate is a matter of legislative grace and not of right (84 C.J.S. 1263, §631). In the absence of a statute no refunds may be made. Upon the cancellation of the invalid tax sale certificate, in accordance with §§194.35, et seq., F.S., the amount paid for such invalid tax sale certificate, together with any amounts paid for subsequent omitted taxes, may be refunded as is provided in and by said statutes. We find no provision in the statutes for refunding deposits made or funds advanced for costs, in so far as such costs have been incurred or paid out. Fees paid the clerk for tax searches made and other services performed or to be performed may not be refunded after they have been incurred. Funds advanced for costs but unused or unincurred evidently may be refunded by the clerk.

The above observations seem to answer the above stated question as well as the same may be here answered.

April 26, 1954.—054-101.

TAX DEED SALES—MUNICIPAL SPECIAL ASSESSMENTS— TAXES AND LIENS—PAYMENT—REQUIREMENTS

QUESTION: When receiving applications for tax deed sales (including municipal tax deeds when required to be issued by the clerk) should the clerk of the circuit court require the redemption or payment of special assessment taxes and liens?

To: *Honorable E. B. Leatherman, Clerk Circuit Court, County Court House, Miami, Florida:*

This office recently issued its opinion of April 16, 1954, (054-90) relative to requiring the payment of both county and municipal taxes as a condition to advertising and holding a tax deed sale; a copy of which opinion is enclosed herewith for your information. As was held in said opinion when the holder of a county tax sale certificate, or a municipal tax sale certificate when municipal tax deeds are required to be issued by the clerk of the circuit court, is required, when making application for a tax deed sale, to "pay to the clerk the proper amount fixed by law for the redemption or purchase of other outstanding tax certificates covering said lands . . ." (§194.12, F. S.). Although §192.21, F. S., provides that "all taxes imposed pursuant to the constitution and laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed . . .", under this provision all valid state, county and municipal taxes, as distinguished from special assessments, are placed upon an equal footing (*City of Sanford v. Dial*, 104 Fla. 1, 142 So. 233; *Poekel v. Dowling*, 108 Fla. 582, 146 So. 662). Special assessments although similar to a tax, are enforced contributions from property owners and are inherently different and governed by entirely different principles. (*Klemm v. Davenport*, 100 Fla. 627, 129 So. 904). Special assessments have reference to special benefits in added values to particular pieces of property (*Klemm v. Davenport*, supra). Such assessments, although a species of taxation, are dis-

tinct from the general burden imposed for state, county and municipal purposes (*State v. Caldwell*, 160 Fla. 355, 35 So. 2d 642).

We do not think that special assessments are "outstanding tax certificates covering said lands" within the meaning, intent and purview of §194.12, F. S., wherefore, the above question is answered in the negative.

July 24, 1953.—053-168.

**TAX SALES AND INTEREST RATE 1953— APPLICATION OF
AMENDED §§193.51, 194.02, F. S.**

QUESTIONS: 1. In the light of the provisions of Sections 193.51 and 194.02 F. S., as amended at the 1953 regular session of the Legislature, what is the maximum rate of interest for the first year on tax sale certificates?

2. What is the maximum rate of interest for the first year for tax sale certificates issued at the 1953 delinquent tax sales?

To: Honorable C. M. Gay, State Comptroller:

Section 193.51, F. S., as amended by §1, Ch. 28286, Laws of Florida, Acts of 1953, provides that "all unpaid taxes upon real estate shall become delinquent on April first of the year following the year in which such taxes were assessed, and shall bear interest at the rate of eighteen per cent per annum for the first year and eight per cent per annum for the time after the first year and the tax collector shall, on or before June first of each year, advertise and sell in the following manner . . ." Although other portions of said §193.51 were amended by the said 1953 enactment the foregoing quoted language was brought into the amendment without change from the section as it existed prior to amendment. The amendatory act became a law on June 15, 1953.

Section 194.02 F. S., as amended by §1, Ch. 28254 Laws of Florida, Acts of 1953, provides for the redemption of tax sale certificates "by paying to the Clerk of the Circuit Court . . . the face of the certificate of sale . . . and interest thereon from the date of the certificate . . . Such interest on lands *hereafter* sold shall be at the rate per annum bid by the purchaser for the period of time from the date of the certificate, not in excess of twelve (12%) per cent per annum and eight (8%) per cent per annum for the time after the first year . . ." This act became effective June 15, 1953, the same date Ch. 28286 became a law. Neither of these acts was signed by the Governor, but both became laws pursuant to §28, Art. III, of the State Const. at the same moment of time. Both became effective upon becoming a law.

Insofar as here material there was no change by the said amendment of §193.51, the provisions regarding interest remained the same; while the amendment of §194.02, Florida Statutes, changed the rate of interest on tax sale certificates from its date to the end of the first year of delinquency, such rate having been reduced from eighteen to twelve per cent per annum. It is noted that this amended rate is made applicable only to "lands

hereafter sold," that is lands sold after June 15, 1953. Although the catch line to said §194.02 indicates that it is applicable only to certificates purchased by individuals the context of the section seems to make it applicable to all tax sale certificates issued by the county tax collector.

When we compare and read together said §§193.51 and 194.02, Florida Statutes, as amended, said §193.51 appears to relate to tax delinquencies beginning on April first while §194.02 relates to the rate of interest on the tax sale certificate "from the date of the certificate of sale." Reading the sections together we feel that the rate of interest for the delinquency between April first and the date of the tax sale will be eighteen per cent per annum, from the date of the tax sale or certificate until the end of the first year of delinquency the rate will be at the rate of twelve per cent per annum and thereafter at the rate of eight per cent per annum. It should be noted that the twelve per cent interest rate on tax sale certificates is applicable only to "lands hereafter sold," that is lands sold for delinquent taxes after June 15, 1953. These observations appear to answer the first question.

As to the second question if the tax sale was held and the tax sale certificates are to bear date prior to June 15, 1953, the rate will be that provided by the statutes prior to the 1953 amendments and if dated on or after June 15, 1953, the rate will be as provided by the statutes as amended.

March 16, 1954.—054-63.

REAL PROPERTY SEPARATELY OWNED AND OCCUPIED— SEPARATE ASSESSMENTS OF INTERESTS

QUESTIONS: 1. Where the owner of real property grants a lesser estate in and to such real property with the right of possession and occupancy, and the owner and holder of such lesser estate constructs a building thereon in which is installed machinery and equipment, to whom should such lesser estate, machinery and equipment be assessed for taxes, when:

(a) The greater estate is not entitled to tax exemption by reason of ownership or ownership and use;

(b) The greater estate is entitled to tax exemption by reason of ownership or ownership and use;

(c) The greater estate is owned by a public utility, within the purview of Ch. 195, F.S., and is returned, valued and certified to the County Tax Assessors pursuant to said Ch. 195, F. S., without the inclusion of the said lesser estate;

(d) The lesser estate embraces two or more parcels of property, some exempt and other non-exempt to the holder of the greater estate or to such estate itself, and the building, machinery and equipment are located partly on and partly off the non-exempt property?

2. Is a tax sale certificate based upon an assessment of "im-

provements only," when the real property upon which the improvements are located is assessed separately and either paid or exempt a valid certificate and enforceable?

3. Should it be held that in one, or more or all, of the foregoing instances that the tax assessment should be upon the tangible personal property tax roll, then when the taxes are not paid on the same and become delinquent what proceedings and steps may be taken to enforce the collection of such delinquent taxes?

To: Honorable C. M. Gay, State Comptroller:

A lesser estate may be one for the life or lives of one or more persons and thereby *real property*; or it may be for a term of years and thereby *personal property* (51 C. J. S. 531, §26; 32 Am. Jur. 39, §16). To the same effect see also 51 C. J. S. 763, §37; 32 Am. Jur. 40, §16; *Deveoman v. Deveoman*, 43 Md. 335; and *In Re. Gay*, 5 Mass. 419. The interest of a tenant for years in real property, when subject to separate assessment, has, in the absence of a controlling statute, *usually been assessed as personal rather than real property* (61 C. J. 210, 184; 84 C.J.S. 212, §95; 2 Cooley on Taxation, 4th Ed. 1268, §593). A lease for the life of a person should be assessed as real and not personal property. Although it is difficult to clearly understand the reasons for the above distinction between leases for life and leases for a term of years, such was the common law rule, and the common law being in force in this State, except where changed by statute and there is no statute changing the common law, it should be followed.

Under the common law and the right of property belonging to the United States and to the State of Florida, including their governmental agencies, to exemption, such property is exempt from all taxation in the absence of a valid statute permitting taxation (84 C. J. S. 380-388, §§197-201). Under §1, Art. IX, and §16, Art. XVI, of the State Constitution, and §192.06, F. S., the property held and used for specific designated purposes, (religious, scientific, municipal, educational, literary and charitable purposes) is entitled to tax exemption by reason of such *ownership and use*. This distinction of tax exemption by reason of *ownership* and by reason of *ownership and use* should and must be kept in mind. Property held by a sovereign or its governmental agency is entitled to exemption by reason of ownership (in the absence of a specific statute permitting taxation) without regard to use. The exemptions under the above mentioned sections of the State Constitution and statutes are coupled with ownership and use and neither ownership nor use alone is sufficient (however, see §192.06 (3), F. S.).

Although a greater estate may be owned by an association mentioned in said sections of the State Constitution and statutes unless used for the purposes mentioned in such laws (religious, scientific, municipal, educational, literary and charitable purposes) such property would not be entitled to exemption. The estate and property interest of a person, firm or corporation leasing real property from a religious, scientific, municipal, educational, liter-

ary or charitable association, institution or corporation, is not entitled to exemption by reason of the character of the lessor. Under such a circumstance neither the greater nor lesser estate would seem to be entitled to exemption where the use under such lease was not for one or more of the above mentioned purposes, unless within the purview of §192.06 (3), F. S., or similar law (in this connection see *State v. Doss*, 150 Fla. 486, 8 So. 2d 17; and *Miller v. Doss*, Fla., 46 So. 2d 888).

Where real property is owned by a sovereign so as to be entitled to tax exemption by reason of ownership, the interest of a lessee or the lesser estate be a property separate and distinct from that of the sovereign such lesser estate may in many cases be subject to taxation although the greater estate is not. However, where the sovereign owner is the United States the right to tax or the exemption of the lesser estate often depends upon federal legislation so that no general rule may be announced (in this connection see our opinion of July 25, 1950, 050-363, relative to the Tampa Garden Apartments, on property leased from the United States.) Leases are made to persons, firms and corporations by the United States, the State of Florida, and governmental agencies for non-governmental use by such lessees, or for uses not sufficient to be within the purview of §192.06, F. S., and other similar statutes and laws. The exemption of the sovereign by reason of its ownership of the fee title to the property leased does not of itself entitle lessee to exemption as a usual thing.

Where both the greater estate and the lesser estate are subject to taxation there should be no separation of the two for purposes of taxation (in the absence of statute) but they should be placed on the tax rolls and assessed as a unit. Real property taxes are levied and assessed against the property itself and not against the owner or owners of interests therein. Only where either the greater interest or the lesser interest is entitled to exemption should the other interest be assessed for taxes separate from the other (See *Bancroft Investment Corporation v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167). We are here dealing with the question of the right to separately assess and tax a leasehold interest or lesser estate in real property in cases where the greater estate is or is not entitled to exemption.

Although there may be a substantial question as to whether a leasehold interest in real property should be assessed for taxes (when subject to separate tax assessment) under Ch. 199 or Ch. 200, F. S., this office in its Tampa Gardens opinion (050-363, above mentioned) held that such leasehold interests should be assessed, where separate assessment is proper, under Ch. 200, F. S. as tangible personal property. Leasehold interests for the life of one or more persons, being in the nature of real and not personal property, should be assessed as real property.

The statutes of this State have for many years provided different methods for enforcing delinquent real (§§193.51-193.59, F. S.) and tangible personal property (§§193.46-193.49, and 200.27-

200.33, F. S.) taxes. Delinquent tangible personal property taxes have been collected through levy and sale of the owners personal property under tax warrant, and not by the issuance of tax sale certificates as for real property (§§193.46-193.49 and 200.27-200.33, F.S.; §§742-745, R. G. S., 1920; §§41, 42, 43 and 44, Ch. 5596, Laws of Florida, Acts of 1907; §§372, 373, 374 and 375, R. S. 1892; §§39, 40, 41 and 42, Ch. 3681, Laws of Fla. Acts of 1887). Prior to Ch. 10040, Laws of Florida, Acts of 1921, a tax assessment on real and *personal property* became a lien upon such property and was superior to all other liens (§371, R. S., 1892; §430, G. S. 1906; and §696, R. G. S. 1920) and under said Ch. 10040 and subsequent statutes "all taxes imposed pursuant to the Constitution and laws of this State shall be a first lien superior to all over liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment." Since the enactment of Ch. 20723, Laws of Florida, Acts of 1941, "all tangible personal property taxes shall be a lien on all the personal property of the taxpayer in the county in which they are assessed from the first day of January for which year the property is liable for assessment" (§200.02, F. S.). There is a continuing duty on the tax collector to collect delinquent tangible personal property taxes beginning with their delinquency and the issuance of the statement or tax warrant under §200.27 and running for a period of seven years thereafter (§200.33, F. S.). There is some doubt that the said seven year limitation existed prior to Ch. 20723, Laws of Florida, Acts of 1941.

Sometimes estates for a term of years, or the machinery and equipment placed upon real property in connection with such estates, have been separately assessed and upon the failure of the owner to pay such assessment tax sale certificates have been issued. Such assessments being of tangible personal property should be treated as such and not as being in the nature of real property assessments, this being true the issuance of tax sale certificates based thereon was unauthorized and void. However, the fact that such tax sale certificates are null and void as such does not render any tax lien that may have attached by reason of the assessment null and void. The statutes and laws providing for tax liens in connection with the assessment of tangible personal property would be applicable, unless the said assessment was for some reason null and void. It is evident that such assessments (gleaned from the fact of the issuance of the tax sale certificate) were made upon the real property tax roll and not upon the tangible personal property tax roll. Since Ch. 20,723, Laws of Florida, Acts of 1941, was enacted tangible personal property has been required to be made on a separate tax roll (§§193.11 and 200.04, F. S.). Prior to 1941 although no separate tax roll appears to have been required "the assessment of personal property shall be made separate from the assessment of real estate . . ." (§711, R. G. S., 1920; §12, Ch. 5596, Laws of Florida, Acts of 1907). In the light of §§192.21 and 200.02, F. S., it is doubted that an assessment of tangible personal property upon the real property tax roll would be void as against the owner, although innocent purchasers of such property might be protected against such an erroneous assessment.

The separate assessment of greater and lesser estates in real property brings up a troublesome question of determining the value of the respective estates. Where such estates are assessed separately the full cash value of the entire property (both the greater and lesser estates) for the purposes of taxation must be segregated and separate values fixed for both estates. Under usual circumstances the combined separate valuations should not exceed in material amount the unit valuation if they were assessed as a unit.

We notice in one of the several letters attached to your request for opinion a reference to the assessment of an ocean pier for the purposes of taxation; in this connection see the case of *Carnasion v. Paul, Fla.*, 53 So. 2d 304, involving such a pier in Volusia County, Florida, and ad valorem taxes assessed against the same, which assessment was upheld.

The several above stated questions are answered, in the light of the above statutes, authorities and observations, as follows:

1. (a) Where both the greater and lesser estates are subject to taxation (even where the lesser estate is considered as being in the nature of personal property) they should be assessed as a unit and not separately. In this connection care should be taken that no personal property which has not become a part of the realty is included in fixing the unit valuation of the realty.
- (b) Where the greater estate is entitled to tax exemption, by reason of ownership or ownership and use, and the lesser estate is not exempt, the lesser estate should be assessed separately. Life estates should be assessed as real property, but estates for terms of years should be assessed as tangible personal property.
- (c) Where the greater estate is owned by a public utility and is returned for taxation, valued and certified to the tax assessor pursuant to Ch. 195, F. S., without the lesser estate being included therein, the said lesser estate may be separately assessed as in paragraph numbered "(b)" above.
- (d) Where the lesser estate is composed of two or more leases or other grants from two or more ownerships, one of which ownerships is entitled to tax exemption by reason of ownership or ownership and use, and the other ownerships are not entitled to such exemptions, where reasonably possible the lesser estate should be severed and the portion of it derived from the non-exempt greater estate should be assessed as a unit with the greater estate and the portion derived from the exempt greater estate should be separately assessed as in paragraph numbered "(b)" above. Where it is not reasonably possible to make such separation the entire lesser es-

tate may be assessed as provided in said paragraph numbered "(b)" above.

2. Where a tax certificate is issued based upon an assessment of "improvements only", such a tax certificate would be unauthorized as the said "improvements only" were based upon an estate in the property for the term of years, but would appear to be authorized if a life estate were being taxed. There is also the possibility that such an assessment was intended to be of machinery or equipment upon the property but which was considered as being no part of the realty and therefore tangible personal property, and in such a case the tax sale certificate would be unauthorized. The fact that such a tax sale certificate was unauthorized and subject to cancellation would not necessarily render the tax lien void under the tangible personal property taxing laws, if otherwise a valid tangible personal property assessment.
3. Although tangible personal property may have been assessed on the real property tax roll and a tax sale certificate issued thereon (the said tax sale certificate being unauthorized and void) the said assessment is not null and void as against the owner of such property and may be enforced against him within the time and in the manner other tangible personal property taxes may be enforced, however, it is doubted that the assessment is such as to bind third persons purchasing the property without actual knowledge of the said assessment. It would not constitute constructive notice to third persons.

February 23, 1953.—053-41.

DELINQUENT TAX LIST—PUBLICATION—
JACKSON COUNTY

QUESTION: Is it mandatory that the newspaper selected to publish the delinquent tax list under §193.51, be both *published* and *printed* within the county where such delinquent tax list is to be published?

To: *Honorable Clyde Mayhall, County Attorney, Marianna, Florida:*

It is assumed that the newspapers referred to in your letter both meet the requirements of §49.03, F. S., 1951 in that they have been published at least once each week and have been entered as second class mail at a post office in Jackson County for a period of one year next preceding the first insertion of the proposed tax list.

Section 193.51, F. S., 1951 requires publication of the delinquent tax list, it to be "published once each week for four consecutive weeks in some newspaper published in the county," and "the newspaper so selected shall have been continuously published in

the county for a period of not less than one year prior to its selection . . ."

A newspaper is "published" where it is entered in the post office and where it is first put into circulation, and not where printed [Vick v. Bishop (Ala.) 40 So. 2d 845]. A newspaper is "published" at the place it is first distributed to the public, irrespective of where printed [Madigan v. City of Onalaska (Wis.) 41 N. W. 2d 206].

A conflict of authority exists in that some courts hold the "place of publication" of a newspaper for the publication of official notices, is the place where the paper is first put into circulation, that is, first issued to be delivered or sent by mail or otherwise to its subscribers [Polizin v. Rand McNally and Company (Ill.) 95 N. E. 623; Drainage District No. 9 v. Merchants' & Planters' Bank (Ark.) 2 S. W. 2d 1079 and cases cited therein]. The contrary rule is that the place of publication is the place where the paper is printed and not where circulated. See 39 Am. Jur. "Newspapers and Press Associations", Section 13.

A newspaper may be printed without being published, whereas it can not be published without having been printed. "Published" can not be construed to mean "Print" [Wolfe Co. Liquors Dispensary Ass'n v. Ingram (Ky) 113 S.W. 2d 839]. The better rule it seems to us is that a newspaper is "published" in the county where it is entered in a post office as second class mail matter under the requirements of §49.03, F. S., 1951; is put into the mail or otherwise distributed to its subscribers.

The newspaper selected must be "published" but not necessarily "printed" within Jackson County, to satisfy §193.51, F. S., 1951.

July 15, 1954.—054-173.

COUNTY TAXES—SUBSEQUENT AND OMITTED— RATE OF INTEREST

QUESTION: What rate or rates of interest should be charged on subsequent and omitted taxes upon the purchase or redemption of a tax sale certificate owned and held by the county?

To: *Honorable C. M. Gay, State Comptroller:*

When §§193.51, as amended in 1953, 193.54, 193.56, 194.02, as amended in 1953, 194.45 and 194.47 (3), F. S., are read together (see also opinion of July 24, 1953, 053-168) in the light of the general rule of statutory construction applicable to taxing statutes that they are construed in favor of the taxpayer and against the taxing authority and those who claim under it (Cunningham v. Stefanidi, 144 Fla. 214, 197 So. 722; Lee v. Wood, 126 Fla. 104, 170 So. 433; Overstreet v. Ty-Tan, Inc., Fla., 48 So. 2d. 158), we feel that the rate of interest for tax delinquency between April first and the date of the tax sale or certificate (and including subsequent and omitted taxes where a county held tax sale certificate is outstanding) will be eighteen per cent per annum, from the

date of the tax sale or certificate (also including subsequent and omitted taxes) until the end of the first year of delinquency the rate will be at the rate of twelve per cent per annum, and thereafter (including subsequent and omitted taxes) at the rate of eight per cent per annum. It should be noted that the twelve per cent per annum interest rate on tax sale certificates and subsequent omitted taxes is applicable only where the tax sale was held subsequent to June 15, 1953.

The above observations, and those contained in our opinion of July 24, 1953 (153-168) appear to answer the above stated question.

TAX SALE CERTIFICATES AND TAX DEEDS

May 10, 1954.—054-115.

MUNICIPALITIES—TAX DEED SALES—SPECIAL BENEFIT ASSESSMENTS—CANCELLATION OF LIENS—STATUS

QUESTIONS: What is the status of municipal and special taxing district assessment liens after an ad valorem tax deed sale, where the only bid is the base or statutory bid required of the applicant for such sale?

2. May the municipality or special taxing district holding such liens be required to cancel their liens of record, or may they enforce such liens against the tax deed purchaser?

To: *Honorable E. B. Leatherman, Clerk Circuit Court, Dade County, Miami 6, Florida:*

"Tax liens are creatures of statute and have no constitutional recognition . . . A tax does not become a lien unless made so by statute and the intent to create must be clearly shown. The extent to which it is created is determined by statute . . ." (State v. Culbreath, 140 Fla. 634, 192 So. 814, text 818.) "The Constitution does not regulate tax liens, therefore, the subject is controlled by statute . . ." (City of Sanford v. Dial, 104 Fla. 1, 142 So. 233, text 238.) "A tax is not a lien even upon the property against which the tax is assessed unless made so by statute . . ." (City of St. Petersburg v. Fiore, 160 Fla. 106, 33 So. 2d 852, text 853.) "There is no express provision in the Constitution of this State upon the subject of special assessments by municipalities for local public improvements . . ." (Anderson v. City of Ocala, 83 Fla. 344, 91 So. 182, text 186) or upon the "subject of the formation of taxing districts for particular purposes nor for special assessments for local improvements by such district . . ." (Richardson v. Hardee, 85 Fla. 510, 96 So. 290, text 291), so that any special assessments made by a municipality or taxing district must be made pursuant to legislative authority which must be substantially followed (City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476.) Counties and municipalities may have general powers of taxation, but special taxing districts do not usually have general powers of taxation (State v. Crandon, 115 Fla. 153, 155 So. 667, text 669.) Al-

though the courts have generally held that the lien for state, county and municipal taxes is superior in dignity to the lien for special assessments for benefits (*Rorick v. Reconstruction Finance Corporation*, 144 Fla. 539, 198 So. 494, text 495), they have also held that "the status of the lien for state, county, or municipal taxes, or for special assessments is one of legislative power and will not be interfered with by the courts unless the requirements of reasonableness, due process and uniformity are shown to have been destroyed" (*Rorick v. Reconstruction Finance Corporation*, *supra*.) The right of the Legislature, under proper conditions and circumstances, to raise special assessment liens to the dignity of state, county and municipal taxes has been recognized (*State v. Everglades Drainage District*, 155 Fla. 403, 20 So. 2d 297; *State v. Warren, et al.*, Fla. 57 So. 337, text 340.) State, county and municipal tax liens are placed upon an equal footing by Section 192.21, Florida Statutes, (*City of Sanford v. Dial*, *supra*; *Packel v. Dowling*, 180 Fla. 582, 146 So. 662.) Everglades Drainage District assessments (Section 1538 Compiled General Laws 1927; Section 10, Chapter 20658, Laws of Florida, Acts of 1941), general drainage district assessments (§298.41, F. S.) and many special drainage district assessments (provided for by the Legislature through special or local acts) have by statute been given liens of equal dignity with liens for state and county taxes.

Under §194.22, F. S., where the property is purchased at a tax deed sale for a sum in excess of the statutory bid such excess is distributed to municipalities and taxing districts (general taxation as distinguished from assessment districts) holding liens equal in dignity to state and county tax liens in payment of such municipal and district taxes, if sufficient in amount for such purpose, but if insufficient such municipalities and taxing districts "shall retain liens upon the property (sold at the tax deed sale) for the remaining unpaid amount . . ." and if the said excess is sufficient in amount to pay said taxes of equal dignity with an excess then the said excess is to be used in payment of special assessment liens, but if insufficient for such purpose "no liens securing said special assessments shall be retained upon said property." We are inclined to construe this statutory provision as retaining liens for general taxes of equal dignity with state and county taxes where the statutory bid is the only bid offered at the tax deed sale. The statute would seem to admit of a construction that under such circumstances special assessments for benefits (not being liens for general taxes of equal dignity with county taxes upon the property), at least in so far as annual installments had matured, would be cut off by the statute; however, even under this construction there remains questions of vested rights of bondholders where such special assessments were made liens equal in dignity with state and county taxes at the time of the issuance of such bonds, which question is judicial and may be finally determined only by the courts. Whether such special assessments are cut off by §194.22, F. S., or remain as encumbrances against the lands sold, is a judicial one to be determined from all facts and circumstances affecting it, with especial notice of the possibility of vested right in bondholders.

The above stated questions may not be answered without determining constitutional questions, and then as to each particular case as it arises, and being judicial in the nature should not be answered by this office. Whether such special assessment liens are cut off or may still be enforced (where the statute providing for such special assessments makes the lien therefor equal in dignity with state and county taxes) are questions to be determined in each particular case and no general rule may be stated answering said questions in all cases. Whether the said special assessment liens are cut off or remain does not appear to be a question for determination by a Circuit Court Clerk's office but one for the concern of the tax deed purchaser, the special assessment district, and those claiming under them.

April 16, 1954.—054-90.

CLERKS CIRCUIT COURT — DUTIES — MUNICIPAL TAX
DEEDS — DELINQUENT MUNICIPAL TAXES —
DELAND, CITY OF

QUESTIONS: 1. When receiving applications for municipal tax deed sales, should the Clerk of the Circuit Court require the payment of redemption of all delinquent and unpaid taxes, both county and municipal?

2. If the above is answered in the affirmative, then may the clerk receive, for and in behalf of the municipality, moneys for the redemption or payment of such delinquent and unpaid municipal taxes?

To: Honorable James H. Sweeny, Jr., Attorney for Clerk Circuit Court, DeLand, Florida:

These questions are only applicable to those municipalities where tax deeds may be issued pursuant to §§194.43 and 194.44, F. S., and are not applicable to the issuance of tax deed by municipalities pursuant to special or local charter or statutory provisions.

We gather from the request for opinion and the supplemental letter of March 11, 1954, that the application in question is based upon a tax sale certificate heretofore issued by the City of Daytona Beach. The general statutes and laws of the state, applicable to municipal corporations, when not in conflict with the municipal charter of said City of Daytona Beach, are applicable (§174, Chap. 19768, Laws of Florida, Acts of 1939) and tax deeds are issued by the Clerk of the Circuit Court for Volusia County, Florida (§120, Ch. 19768, supra,) evidently pursuant to §§194.43 and 194.44 F. S. We, therefore, feel that the requirements and procedure for the issuance of a municipal tax deed by a clerk of the circuit court, in the absence of express provision in the municipal charter or by local law applicable to said municipality, are the same as for the issuance of a county tax deed.

Under §194.15, F. S., a holder of a county tax sale certificate is required, when making application for a tax deed sale, to "pay to the clerk the proper amount fixed by law for the redemption or

purchase of all other outstanding tax certificates covering said lands . . ." This provision is identical with that contained in Section 1, Ch. 17457, Laws of Florida, Acts of 1935, relating to state tax deeds and tax deed sales. Under prior statutes and laws the applicant for a tax deed was required to surrender to the clerk the certificate forming the basis for the tax deed and pay "to the clerk the proper amount for the redemption or surrender of all other outstanding certificates covering said lands" (§779, R. G. S. 1920; §577, G. S., 1906; §10, Ch. 4888, Laws of Florida, Acts of 1901.) Although we do not find a like provision in prior statutes and laws, we do find a requirement in §59, Ch. 4322, Laws of Florida, Acts of 1895, that the purchaser of a state tax sale certificate from the State "shall purchase all the certificates held by the State, *city or town* upon the same property . . ." A like provision was contained in §60, Ch. 4115, Laws of Florida, Acts of 1893, §56, Ch. 3681, Laws of Florida, Acts of 1887; §57, Ch. 3413, Laws of Florida, Acts of 1883.

In an opinion rendered by a former Attorney General of this State on May 5, 1928 (1927-8 Biennial Report 323) it was held that "the language of the statute (§779, R. G. S., 1920) is that 'all other outstanding certificates covering said lands' shall be paid for and there is nothing in the statute to indicate that this language means only those outstanding taxes which are held by the State . . ." Although there was a slight change in the language used after the said opinion of May 5, 1928, it remains substantially the same. The statutes seem to require the payment or redemption of all other outstanding taxes and tax liens encumbering the property but we feel that such requirement relates to the duties of the clerk and that his failure to require redemption or payment of all outstanding taxes and tax liens will have no effect on such liens as property of the holders thereof (*Allison Realty Company v. Graves Investment Company*, 115 Fla. 48, 155 So. 745; *Coult v. McIntosh Investment Company*, 133 Fla. 141, 182 So. 594, text 601) and such liens may be substantially enforced. We see no reason to depart from the said 1928 holding by this office.

Although the statutes appear to require that all outstanding county and municipal tax sale certificates be purchased or redeemed in connection with an application for tax deed sale pursuant to §194.15, F. S., we find no general authority requiring, or even authorizing, the clerk of the circuit court to assign municipally owned certificates, or receive payments in redemption thereof. It is our information that there may be some special or local charter provisions providing for such redemptions or assignments; however, in most, if not all, of such cases the clerk is furnished with a duplicate or certified copy of the municipal delinquent tax rolls. We know of no provision of law providing for the furnishing of the Clerk of the Circuit Court for Volusia County with a copy of the delinquent tax rolls of the City of Daytona Beach. Upon an application for a municipal tax deed sale the clerk of the circuit court should require that the applicant pay all outstanding delinquent county taxes as well as outstanding municipal taxes, although he has no authority to receive money

in payment of the said municipal taxes. Where the applicant shows that the municipal officers will not permit the payment or redemption of any outstanding municipal taxes, to the satisfaction of the clerk, he would seem to be justified in proceeding with the application, although the applicant might have a remedy at law through a mandamus proceeding to require the redemption or sale. These observations seem to answer the second question as well as the same may be here answered.

September 1, 1953.—053-224.

INTERNAL IMPROVEMENT FUND—MURPHY ACT LANDS— RECOVERY BY FORMER OWNER

QUESTIONS: 1. Who is entitled to receive the tax payments mentioned in subsection (7) of §2, Ch. 28317, Laws of Florida, Acts of 1953?

2. Would the requirement of "evidence satisfactory to the Trustees," required by said subsection (7), be met by a blanket statement certified by the Clerk of the Circuit Court to the Trustees that applicant has paid all unpaid prior taxes levied plus an amount representing all taxes which would have been due had the lands not vested in the state under the Murphy Act be sufficient, or should a detailed tax statement by years and amounts of taxes each year be required?

3. Is "the price offered for the lands," mentioned in subsection (4) of said §2 the only amount to be considered by the Trustees in the acceptance or rejection of the bid?

To: Trustees of the Internal Improvement Fund:

Chapter 28317, Laws of Florida, Acts of 1953, was derived from House Bill No. 990 introduced at the 1953 regular session of the State Legislature, which bill was amended upon the recommendation of the Committee of Judiciary-Civil by the insertion of said subsection (7) of §2 of the said bill and Ch. 28317. It seems evident that the Legislature designed Ch. 28317 as a hardship measure similar to Ch. 22870, Laws of Florida, Acts of 1945, now appearing as §§194.471 to 194.474, F. S. The Legislature, doubtless feeling that the former owner would be able to recover his lands, often times lost by him under the Murphy Act because of an old and outstanding tax sale certificate unknown to him, for a small consideration of what it would cost him to recover it through an auction sale pursuant to §192.38, F. S., or maybe in some cases for a mere nominal consideration, felt that he should, as a consideration for permitting him to so recover title to his said lands, be required to pay such a sum as would have been paid had he or his predecessors in title paid taxes upon said lands since the issuance of the tax certificate which formed the basis of the state's title under the Murphy Act. Said subsection (7) may have been designed to place the former owner, who elects to purchase under said Chapter 28317, on a par with his neighbors who paid their taxes over the years without delinquency.

It is to be noted that the statutes require "evidence satisfactory to the trustees of the payment of" the taxes therein mentioned. If the taxes were to be paid to the trustees then evidence "of the payment of all taxes" would seem to be improper, but *evidence of the amount* of such taxes should be furnished the trustees, *not evidence of the payment* of such taxes. Had the taxes been kept paid they would have been paid to the tax collector, or maybe to the Clerk of the Circuit Court in case of delinquency, and by such officer distributed to the several taxing units and authorities entitled thereto. We, therefore, feel that the payments to be made under said subsection (7) are payable to the Clerk of the Circuit Court for the use of those agencies who would have received the taxes had they been paid and never allowed to become delinquent. These observations seem to answer the first question.

"Evidence satisfactory to the Trustees" merely means that the purchaser under Ch. 28317, Laws of Florida, Acts of 1953, must pay the taxes mentioned in subsection (7) above mentioned to the Clerk of the Circuit Court and furnish evidence of such payment to the Trustees. The responsibility of ascertaining the amount of the taxes is on the Clerk of the Circuit Court and other taxing authorities of the county, not on the Trustees. It seems to us that a receipt showing payment of all such taxes executed by the Clerk of the Circuit Court, or a certificate executed by said clerk, would be sufficient evidence; however, it is the duty of the Trustees to determine, by rule, regulation or otherwise, what evidence they desire in such cases. These observations seem to answer the second question.

When the application for the purchase of Murphy Act lands under Ch. 28317, Laws of Florida, Acts of 1953, complies with the requirements of subsection (7) of §2 of said chapter, "the price offered for the lands," mentioned in subsection (4) of said §2 is the only amount to be considered by the Trustees in accepting or rejecting the bid offered for the lands. The Trustees, by rule, regulation or otherwise, should adopt a formula for determining the minimum bid to be considered, and in this connection due consideration should be given to the fact that the purchaser has been required to pay all past and present unpaid taxes on the said land. These observations seem to answer the third question.

August 19, 1953.—053-204.

**TAX SALES CERTIFICATES—LANDS SOLD TO PURCHASERS
OTHER THAN COUNTY—APPLICATION OF CH. 28254,
ACTS 1953.**

SUPPLEMENT TO OPINION NO. 053-168

QUESTION: Do the provisions of §194.02, F. S., as amended by §1, Ch. 28254, Laws of Florida, Acts of 1953, apply to all tax sale certificates issued after June 15, 1953 (the effective date of the amendment) or only to those certificates sold to purchasers other than the county?

To: Honorable C. M. Gay, State Comptroller:

Section 194.02 was derived from §19, Ch. 20722, Laws of Florida, Acts of 1941, as amended by §8, Ch. 22079, Laws of Florida, Acts of 1943. An examination of said sections in the 1941 and 1943 acts, as well as said §194.02 in successive Florida Statutes from 1941 to 1951, reveals that the sentence, "Lands sold to purchaser other than county may be redeemed," is no part of the body of the section but is merely the title of the section (59 C. J. 799, Section 376). The language in §194.02, F. S., was taken substantially from §770, R. G. S., 1920, and said section as amended by §9, Ch. 14572, Laws of Florida, Acts of 1929. The only material difference in the several statutes, beginning with said §770 and ending with the 1953 amendment, has been the changes in the rate of interest; otherwise the language of the statutes has been substantially the same. The language of the statute has remained substantially the same, except for the rate or rates of interest and penalties, since the adoption of Ch. 4888, Laws of Florida, Acts of 1901.

Prior to the adoption of Ch. 20722, Laws of Florida, Acts of 1941, the title to the section (in the G. S., 1906, the R. G. S., 1920, and §9, Ch. 14572, Acts 1929) was "Lands Sold may be Redeemed," the reference in the title to lands sold to purchaser other than county, appeared in the 1941 act for the first time. We find no evidence of intention on the part of the Legislature to limit the operation of §194.02, F. S., to lands sold to purchasers other than the county. Prior to 1941 the statute clearly applied to all tax sale certificates, those sold to individuals as well as those sold to the state. Should said §194.02 be construed as being limited to those certificates sold to purchasers other than the county, then we will have a different rate of interest applying to the two classes of tax sale certificates. Those sold to the county would draw interest for the first year at the rate of eighteen per cent while those sold to individuals would be limited to an interest rate for the first year not exceeding twelve per cent.

It is our view that the section of the statute, as amended at the 1953 session of the Legislature, is applicable to tax sale certificates sold to the county as well as those sold to purchasers other than the county.

This opinion should be considered as supplemental to our opinion of July 24, 1953 (053-168).

December 4, 1953.—053-318.

TAX SALES CERTIFICATES—CANCELLATIONS— LIMITATIONS

QUESTION: Are cancellations of tax sale certificates under §194.58, F. S., limited to those certificates barred by the limitations contained in §196.12, F. S.?

To: State Road Department:

"In case of doubt and uncertainty as to the meaning of a provision of a code or of compiled or revised statutes resort in as-

certaining its true meaning may properly be had to the act from which the provision was derived" (50 Am. Jur. 464, §446), including resort to the title of the original act (50 Am. Jur. 467, §449). Other statutes in *pari materia* (50 Am. Jur. 343, §348) and upon cognate subjects, although not strictly in *pari materia*, (50 Am. Jur. 342, §347) may also be considered. Said §194.58 was derived from Ch. 23828, Laws of Florida, Acts of 1947, which contained the following preamble:

"WHEREAS, under the provisions of Chapter 19515, Laws of Florida, Acts 1939 Legislature, being Section 196.12, Florida Statutes 1941, a period of 20 years from the date of issuance thereof is declared to be the life of any tax sale certificate issued against any lands in the State of Florida, whether issued for State, County or Municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, and no action on such certificate may be maintained after such lapse of time and no tax deed may issue thereon.

"AND WHEREAS, in the interest of the public, and of orderly efficient administration of the office of the Clerk of the Circuit Court, provision should be made to note the cancellation or invalidity of such tax sale certificates upon the official records in the office of the Clerk of the Circuit Court."

It should be remembered that said §194.58 was derived from a 1947 act, and that under the Murphy Act (Ch. 18296, Laws of Florida, Acts of 1937) sales of tax sale certificates were made pursuant thereto up to and including June 9, 1939 (see §192.39, F. S.), many of which were more than twenty years old at the date of sale. Any of these Murphy Act certificates encumbering homesteads were not subject to enforcement until the expiration of ten years from the date of the sale thereof under the said Murphy Act (see §192.36, F. S.) Although these Murphy Act certificates may have been more than 20 years old at the time of the enactment of Ch. 23838, Laws of Florida, Acts of 1947, May 27, 1947, none of them could have been sold under the Murphy Act for more than ten years until sometime after June 9, 1947. Many of such certificates had not been sold for ten years on the effective date of said §192.58, which was January 1, 1948. It seems quite clear to us that the Legislature had no intention of including such Murphy Act certificates in §194.58, F. S., and providing for their cancellation even before they could have been enforced.

Although the body of Ch. 23828, Laws of Florida, Acts of 1947, (now appearing as §194.58, F. S.) is broader than its preamble, we feel that said section must be read and construed in connection with its said preamble, its possible effect, at the time of its enactment, upon Murphy Act certificates encumbering homesteads, and the fact that to apply its broad terms to all certificates, including Murphy Act certificates, more than twenty years old

would probably amount to the taking of private property without due process of law, as the section is not cast in the form of a limitation or statute of non-claim. To construe §194.58 as applying to those tax sale certificates barred by §196.12, treating said §196.12 as being in the nature of a statute of non-claim, avoids that constitutional difficulty.

The above question is answered in the affirmative. This construction is in accord with opinions of this office dated August 4, 1947 (1947-8 Biennial Report 214), October 9, 1947 (1947-8 Biennial Report 216), December 16, 1947 (1947-8 Biennial Report 217), and February 12, 1948 (1947-8 Biennial Report 211).

August 28, 1954.—054-210.

TAX SALE CERTIFICATES—HELD BY STATE, COUNTIES OR MUNICIPALITIES—LIMITATION UPON ENFORCEMENT

QUESTION: Is there any limitation upon the enforcement of tax sale certificates held by the State, and the counties, and municipalities of the State, and if so, what is the same?

To: Honorable C. M. Gay, State Comptroller:

Although §95.02, F. S., which was derived from §20, Ch. 1869, Laws of Florida, Acts of 1872, provides that Ch. 95, F. S., "shall not apply to any action by this State, or by an officer or person in behalf of this State . . . or any county or municipal corporation . . . within this State . . ." Section 95.021, F. S., which was derived from §1, Ch. 28270, Laws of Florida, Acts of 1953, provides that "the provisions of existing law, whether provided by this chapter or any other chapter of Florida Statutes, whereby an action is barred if not commenced within twenty years, shall apply to any action by the State, or any of its agencies, or by an officer or person on behalf of the state or any of its agencies, or by any county or municipal corporation of this State." Actions barred by the terms of the Act at the time of its enactment were permitted to be filed within one year from June 15, 1953, a period of time now expired.

Under §196.12, F. S., "a period of twenty years is declared to be the life of any tax certificate issued against any lands in the State of Florida, whether issued for *State and county taxes* or issued by a municipality for *municipal taxes* and held by a private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, such period of twenty years to be reckoned from the date of the issuance of such tax certificate . . ." The provisions of said §196.12, F. S., are expressly inapplicable to "tax certificates which were sold under the provisions of Ch. 18296, Acts 1937, Laws of Florida, commonly known as the Murphy Act." It is noted that this section applies to *tax certificates* issued for state and county *taxes* or municipal *taxes* and no mention is made of tax liens where no tax certificate is issued or to assessments for benefits where bond holders may have an interest. We would be inclined to construe the statute strictly and hold that the section has no application to

tax liens where no tax certificate is issued and to assessments for benefits, but feel that this question should be left to the courts.

Title to the lands encumbered by State held tax sale certificates issued prior to June 9, 1935, became vested in the State on June 9, 1939, thereby merging the tax certificate and its lien with the title to said lands (§9, Ch. 18296, Laws of Florida, Acts of 1937, also appearing as §192.38, F. S.) and are not, therefore, within the purview of said §95.021, F. S.

The above question is answered in the affirmative, the said limitation being a "period of twenty years to be reckoned from the date of the issuance of such tax certificates."

TAXES ON RAILROADS AND PULLMAN EXPRESS COMPANIES

July 14, 1954.—054-171.

TAXATION—RAILROADS—LANDS—ASSESSMENT OF LEASEHOLD INTERESTS—CH. 195, F. S.

QUESTION: Where leasehold interests are granted in lands assessed to railroads under Ch. 195, F. S., by the railroad to third persons for business purposes, may the interest of the said lessee be separately assessed by the local tax assessor?

To: Honorable C. M. Gay, State Comptroller:

Real and personal property owned and held by railroads for operating purposes are subject to taxation under Ch. 195, F. S., under which chapter returns are made to the State Comptroller and the tax valuation, when not approved by the State Comptroller upon tax return made, is fixed by the Railroad Assessment Board. Under §195.01, F. S., railroads are required to make tax return to the State Comptroller, under Ch. 195, F. S., of "the total length of such railroad, the total length and value of such main track, branch, switch and spur track, the side tracks, *lots and parts of lots not leased or rented*, and terminal facilities, in this state . . ." Doubtless it was the intent and purpose of the statute to require tax returns of the operative properties of railroads to be made to a central state agency and assessed as a unit by a state agency.

We are inclined to construe the above statute as requiring unit return and valuation of the operative properties of railroads, and the fact that some of the properties may not be immediately needed for railroad operation does not prevent it being operative properties within the purview of the above statute. This may be true although some of such properties may be leased by the railroad for short periods of time pending the need thereof for operative purposes. Any lease for a considerable period of time would be an indication that the property was not needed for operative purposes; while on the other hand a lease at sufferance or at will would be *prima facie* that the property may be shortly needed for

operative purposes and probably would justify the return of such property for operative purposes. Where property has been leased, although such leases purport to be at sufferance or at will, for a long period of time an investigation would seem to be justified to determine its need for operative purposes. *Lots and parts of lots leased for long terms*, or that have been leased and not used by the railroad for long periods of time, would not seem to be within the purview of Ch. 195, F. S., and should be locally assessed.

So long as returns of such properties are made to the State Comptroller and accepted by him the same should not be locally assessed also, however, the proper procedure, where the local tax assessor feels that the lands should be locally assessed although returned under Ch. 195, F. S., would seem to be for the tax assessor to advise the State Comptroller of his findings in the matter so that he may determine whether it should be included in the railroad unit return or be locally assessed.

In the absence of express contract to the contrary all building in the nature of permanent improvements become part and parcel of the realty and may not be separately assessed in the absence of express statute. Where through the rental agreement, express or otherwise, the building on realty does not become a part of the realty such building will constitute personal and not real property and may be assessed as tangible personal property. The fact that a building is constructed by a lessee does not prevent it becoming a part of the realty; only when the facts and circumstances, or the express agreement between the parties, clearly show otherwise may the building be considered and assessed as tangible personal property.

Usually leasehold interests for terms of years are to be considered and treated as personal property and not as real property. Where the leasehold interest is not included in the tax return of the railroad the same may be assessed to the lessee as tangible personal property.

These observations seem to answer the above stated question as well as the same may be generally answered.

INHERITANCE AND ESTATE TAXES

March 18, 1954.—054-68.

INHERITANCE AND ESTATE TAXES— RECIPROCAL TAX EXEMPTIONS

QUESTION: Where a State Constitution provides that there shall be no inheritance and estate taxes levied and assessed by that state, other than those taxes which may be credited against or deducted from federal inheritance and estate taxes, may there be any reciprocity between that state and other states levying inheritance and estate taxes in addition to those which may be credited or deducted from federal taxes, under statutes such as §198.02, F. S.?

To: Honorable C. M. Gay, State Comptroller:

Section 11, Art. IX, of the State Const., provides in part that "no taxes upon inheritances . . . shall be levied by the State of Florida, or under its authority . . . Provided, however, that the Legislature may provide for the assessment, levying and collection of a tax upon Inheritances, or for the levying of Estate taxes, not exceeding in the aggregate the amounts which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon Inheritances, or taxes on estates assessed or levied by the United States on the same subject, but the power of the Legislature to levy such Inheritance taxes, or Estate taxes in this State, shall exist only so long as, and during the time, a similar tax is enforced by the United States against Florida Inheritances or Estates and shall only be exercised or enforced to the extent of absorbing the amount of any deduction or credit which may be permitted by the laws of the United States, now existing or hereafter enacted to be claimed by reason thereof, as a deduction or credit against such similar tax of the United States applicable to Florida Inheritances or Estates."

Section 198.02, F. S., provides that "a tax is imposed upon the transfer of the estate of every person who, at the time of death, was a resident of this State, the amount of which shall be a sum equal to the amount by which the credit allowable under the applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to the several states shall exceed the aggregate amount of all constitutionally valid estate, inheritance, legacy and succession taxes actually paid to the several states of the United States (other than the State of Florida) in respect to any property owned by such decedent or subject to such taxes as a part of or in connection with his estate." (Emphasis supplied)

Section 198.03, F. S., as amended by §1, Ch. 28031, Laws of Florida, Acts of 1953, provides that "a tax is imposed upon the transfer of real property situate in this state, upon tangible personal property having an actual situs in this state, upon intangible personal property having a business situs in this state and upon stocks, bonds, debentures, notes and other securities or obligations of corporations organized under the laws of this state, of every person who at the time of death was not a resident of this state but was a resident of the United States, the amount of which shall be a sum equal to such proportion of the amount of the credit allowable under the applicable federal revenue act for estates, inheritance, legacy and succession taxes actually paid to the several states, as the value of the property taxable in this state bears to the value of the entire gross estate wherever situate." (Emphasis supplied) The underlined portion of said section was added by the 1953 Florida Legislature. The said 1953 enactment became effective from and after May 26, 1953.

In construing the two above statutes we must keep in mind the limitation placed upon the Legislature by the above quoted provision of the State Const. The Legislature is without authority to levy an inheritance or estate tax going beyond the limitation

contained in the said Const. Under the said limitation the total Federal and Florida inheritance and estate tax cannot exceed the total Federal tax if Florida had no such tax. Under the Constitution of this State the Legislature may levy an inheritance or estate tax only "to the extent of absorbing the amount of any deduction or credit which may be permitted by the laws of the United States . . . as a deduction or credit against such similar tax of the United States applicable to Florida inheritances or estates." Under §198.02, F. S., all the property (real property and tangible and intangible personal property) of each resident of this State passing upon his death is made subject to an inheritance or estate tax. Under §198.03, F. S., the real property, tangible personal property and intangible personal property having a situs in this State is made subject to the tax. It is now generally accepted that intangible personal property may acquire a taxable or business situs in a state other than the residence of its owner.

Under recent decisions of the Supreme Court of the United States intangible personal property acquiring a business situs in states other than that of the residence of its owner, may be taxed, including inheritance and estate taxes, not only in the state of the residence of its deceased owner but also in such states as it may have acquired a business situs (*Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. ed. 1339; 123 A. L. R. 162; *State Tax Commission v. Aldrich*, 316 U. S. 174, 62 S. Ct. 1008, 86 L. ed. 1358, 139 A. L. R. 1436). Under these decisions we see no reason why inheritance and estate taxes may be assessed not only by the state of the residence of their deceased owner but also in such other states wherein they may have acquired a business situs.

Section 198.44 F. S., provides that "the tax imposed under the inheritance and estate tax laws of this state in respect to personal property (except tangible property having an actual situs in this state) shall not be payable (a) if the transferer at the time of his death was a resident of a state or territory of the United States, or the District of Columbia, which at the time of his death did not impose a death tax of any character in respect to property of residents of this state (except tangible personal property having an actual situs in such state, territory or district), or (b) *if the laws of the state, territory or district of the residence of the transferer at the time of his death contained a reciprocal exemption provision under which nonresidents were exempted from said death taxes of every character in respect to personal property (except tangible personal property having an actual situs therein), and provided that the state, territory or district of the residence of such nonresident decedent allowed a similar exemption to residents of the state, territory or district of residence of such decedent.*" (Emphasis supplied)

Reciprocal tax exemption statutes, such as above §198.44, F. S., were designed as a means of solving the vexing problem of multiple taxation of the same property by two or more states (*Re. Miller's Estate*, 239 Wis. 551, 2 N. W. 2d 256, 139 A. L. R. 1056, text 1060), and such a legislative policy for avoiding multiple taxation is a valid classification on taxable property and may

be adopted to attain that end (*Lawrence v. State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 1102, 87 A. L. R. 374). "Many states endeavor to avoid the evil of the former rules permitting multiple taxation by different states of the same transfer by resort to reciprocal exemption laws, that is, laws exempting the personal property of residents of states which although imposing an inheritance tax on their own residents conferred a similar exemption to residents of the state in which such law was enacted. There are also reciprocal exemptions relating to other subjects, such as reciprocal exemptions of bequests to foreign charitable institutions. Such a statute is not like an offer of a contract, to be accepted in terms or not at all, but it should be liberally construed. Actual reciprocity between states as to the omission to exact a transfer tax is not destroyed by the failure of administrative officers to execute a law in the mistaken belief that it has ceased to bind them, or by an unconstitutional attempt to withdraw a statutory provision for reciprocity by retroactive legislation. It has been held that a state succession tax law which providing that an exemption of transfers of intangible personalty by a non-resident decedent from inheritance tax if at the time of the death of such decedent a like exemption is given 'by the laws of the state, territory, or district of the decedent's residence in favor of residents of this state' does not extend to a case in which the decedent was a resident of a foreign country the laws of which make a like exemption; that this interpretation did not make such an improper classification as to make the statute unconstitutional, or even to cause grave doubts as to its constitutionality, since the purpose of the exemption provision was to meet a domestic problem arising frequently between neighboring states and the classification was thus germane to the purpose of the statute. It has been held that the fact that intangibles, consisting of stocks, bonds, and treasury notes, held by a trustee in one state under a trust created by a resident of another state, had acquired a business situs in the first state did not preclude the application of the reciprocity provision of the inheritance tax law of that state, and that such statute precluded the subjection of such property therein to inheritance taxation, where the state of the owner's domicile provided for a like exemption in respect of intangibles of nonresidents. And it was held that the fact that no transfer to the beneficiaries, under such a trust of intangibles created by a resident of another state had taken place at the effective date of the repeal of the reciprocity provision of the inheritance tax statute of the state of the trustee did not preclude the application to such trust property of such statute, which was in effect at the date of the creator's death. The reciprocal provisions of a state succession tax law, whereby property of a nonresident may escape the tax if the tax law of the state of his domicile likewise exempts property of nonresidents, do not create an obligation which one state may enforce against another, or a right which it may assert in behalf of its citizens, by suit in the Supreme Court of the United States." (28 Am. Jur. 104, §200).

Reciprocity tax exemption provisions in estate and succession taxing statutes, such as §198.44, F. S., above quoted, have been before the courts of this country in *McNaughton v. Newport, Ida.*,

170 P. 2d 601; *State v. Davis*, 88 Kan. 849, 129 P. 1197, Ann. Cas. 1914B 688; *Bliss v. Bliss*, 221 Mass. 201, 109 N. E. 148, text 152; *Borden v. Treasurer*, 221 Mass. 212, 109 N. E. 153; *State v. Probate Court*, 128 Minn. 371, 150 N. E. 1094; *St. Louis Union Trust Company v. State*, 348 Mo. 725, 155 S. W. 2d 107, text 111 and 112 (314 U. S. 700, 62 S. Ct. 485, 86 L. ed. 560); *Smith v. Loughman*, 245 N. Y. 486, 157 N. E. 753, 247 N. Y. 546, 161 N. E. 176 (275 U. S. 560, 48 S. Ct. 119, 72 L. ed. 426); *City Bank and Farmers Trust Company v. New York Central Railroad Company*, 253 N. Y. 49, 170 N. E. 489, 69 A. L. R. 940; *Commonwealth v. Taylor*, 297 Pa. 335, 147 Atl. 71; *Re. Miller's Estate*, 239 Wis. 551, 2 N. W. 2d. 256, 139 A. L. R. 1056; *Re. Uihlein's Estate*, 247 Wis. 476, 20 N. W. 2d 120; *Re. Petit's Estate*, 252 Wis. 94, 31 N. W. 2d 140; *Re. Robins' Estate*, 258 Wis. 206, 47 N. W. 2d 889.

In its opinion in *Re. Uihlein's Estate*, supra, the court remarked that "New York does not impose a tax on intangible property within the state belonging to a nonresident. It follows that residents of New York were then entitled to the benefit of our reciprocity statute in such circumstances."

The Supreme Judicial Court of Massachusetts, in *Bliss v. Bliss*, 221 Mass. 201, 109 N. E. 148, text 152, in this same connection remarked:

"... Our statute should be interpreted in the light of the evil at which it was aimed and the purpose intended to be accomplished. The words 'like exemption' in our statute are satisfied by the terms of the New York statute. Said Chief Justice Shaw in *Houghton v. Field*, 2 Cush. 141, 145: 'Like' does not necessarily mean the same in all particulars, but rather the contrary. 'Like' in this connection does not imply identity but only similarity. It does not impart coextensiveness in every detail, but only a resemblance in its salient features. See, also, *Hopkins v. Benson*, 21 Me. 399; *United States v. Wallace*, 116 U. S. 398, 400, 6 Sup. Ct. 408, 29 L. ed. 675. 'Exemption' as applied to taxation signifies an immunity or freedom from that pecuniary burden. The New York statute covers the same general subject of taxation on successions as does our act. It is of 'like character.' It defines the classes of property to which it applies. It omits the particular kind of property here involved. That is as much an exemption in a broad sense as would be a comprehensive general phrase with certain denominated exceptions. The resulting freedom from taxation would be accomplished in one way as well as in the other. Although the New York law and our own are not exactly commensurate and coterminous in every respect as to property of a nonresident not made subject to the succession tax, yet as New York would not impose a succession tax on property exactly like that here in question and in New York in the same sense as this is in Massachusetts, if it belonged to a deceased resident of Massachusetts, we are of opinion that the descriptive words

of our statute 'like exemption' are satisfied. To the same effect is the well-reasoned opinion in *Kansas v. Davis*, 88 Kan. 849, 129 Pac. 1197, Ann. Cas. 1914B, 688."

To the same effect see also *State v. Davis*, 88 Kan. 849, 129 P. 1197, text 1198 and 1199. A different rule appears to have been expressed in *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094; however, the said Minnesota rule appears to be the minority and not the majority rule.

Although the rate of any inheritance or estate taxes that may be levied in Florida may be limited by the State Constitution so that the exemption under Florida laws may be greater than the exemption in other states, nevertheless there is a reciprocal exemption with other states which have statutes and laws like or similar to §198.44, F. S. The fact that under Florida's Const. its estate and inheritance taxes are limited to the credit that may be allowed under federal statutes does not mitigate against the general rule, as under such limitation exemption is allowed nonresidents as well as to residents of the State. Although prior to May 26, 1953, there was no express estate or inheritance tax against intangible personal property, since said date, by virtue of §198.03, F. S., as amended by Ch. 28031, Laws of Florida, Acts of 1953, such a tax has been levied by the statutes and laws of this State.

The above question is answered in the affirmative, and opinion No. 051-35, of February 21, 1951, by this office is hereby overruled and withdrawn.

INTANGIBLE PERSONAL PROPERTY TAXATION

June 9, 1954.—054-136.

INTANGIBLE PERSONAL PROPERTY—TAX LIENS— CANCELLATION

QUESTION: Where the enforcement of intangible personal property tax liens is barred by the running of the seven year limitation provided in §199.23, F. S., is there any power or duty on the part of the State Comptroller or any county officer to cancel or note the cancellation of the lien on the public records evidencing said tax lien or the assessment upon which it was based?

To: C. M. Gay, State Comptroller, Capitol Building:

Under the statutes of this State the lien of intangible personal property taxes is limited to a period of seven years from and after the date of the issuance of the said execution (§199.23, F. S.; *Gay v. Rutherford, et al.*, decided May 25, 1954, but not yet reported.) We are inclined to the view that the tax collector cannot defer the beginning of the running of the statute by withholding the issuance of the tax execution for a period of time; in that the statute requires that "beginning on the first day of May the tax collector shall issue tax executions for enforcing the collections of all intangible personal property taxes remaining

unpaid on that date" (§199.18, F. S.) Although the tax collector is required to begin the issuance of tax executions on the first of May he doubtless is given ample time to issue all the required executions and would not have to issue all of them on the same day; he would seem to be required to issue them within a reasonable time under the circumstances; so that where no lien is actually issued by the tax collector we feel that the statute would nevertheless begin to run within a reasonable time after said May first.

The Court in *Gay v. Rutherford, et al.*, supra, held that after the running of the statute "the liens against the real estate were void." The tax records, the statutes, and the public records of the county, or one or more of them, show when the tax execution was issued or should have been issued if not actually issued, so that no notation appears to be necessary to advise an interested party of the status of the intangible personal property tax for any particular tax year upon any particular parcel or lot of land. We find no statute providing for, requiring or authorizing any notation of cancellation, or running of the statute, upon any tax assessment record or tax execution by any state or county officer. The State Comptroller in addition to being auditor of the accounts of the State is authorized to "perform such other duties as may be prescribed by law" (§§23, Art. IV, State Const.). The powers, duties and compensation of county officers (including tax collectors and clerk of the circuit court) are those prescribed by law (§6, Art. VIII, State Const.). We find nothing in the statutes and laws of this State, either directly or indirectly, authorizing or requiring cancellation of intangible personal property tax liens, when barred by the statute of limitation above mentioned, or the making of a notation of the running of such statute of limitation upon the tax roll or record of tax warrant or execution in the office of the clerk of the circuit court, by any state or county officer, in a like or similar manner as is provided under §§194.58 and 196.12, F. S., as to tax sale certificates on real property. There is nothing, even in the light of the above mentioned opinion in the *Gay v. Rutherford* case, which the tax collector or clerk of the circuit court is required, or even authorized, to do with respect to intangible personal property taxes and tax liens after the running of the statute of limitation thereon.

The above stated question is, therefore, answered in the negative.

August 5, 1954.—054-186.

TAXATION—NOTES AND BONDS—MUNICIPAL MORTGAGE ON MUNICIPAL REAL PROPERTY

QUESTION: Are notes or bonds made, executed and delivered by a municipal corporation, and secured by a mortgage encumbering municipal real property, subject to Class "C" intangible personal property taxes in this State?

To: *Honorable C. M. Gay, State Comptroller:*

Under subsection (5) of §199.02, F. S., "intangible personal

property belonging to the State of Florida, or any political subdivision thereof, or intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." The said term "political subdivision" appears to embrace "cities, towns, villages" (subsection (10), §1.01, F. S.). Property held and used for municipal purposes is not subject to taxation in this State (§1, Art. IX, and §16, Art. XVI, State Const.; §192.06, and 199.02, F. S.). Notes and bonds secured by a mortgage encumbering municipal property are in contemplation of law *municipal bonds* and within the purview of §6, Art. IX, State Const. (see *Brash v. State Tuberculosis Board*, 124 Fla. 167, So. 827, text 830).

Subsection (5), §199.02, F. S., and §1, Art. IX, and §16, Art. XVI, State Const., grant tax exemption to property held and used for municipal or one of the other purposes mentioned, and do not extend to persons, firms and corporations owning and holding such property after its issuance by an association or corporation within the purview of such statute and constitutional provisions. It is noted that "bonds of the several municipalities, counties and other taxing districts of the State of Florida," are exempted from Class "B" intangible personal property taxes; however, there is no such exemption found in Classes "A", "C", and "D". (see §199.02, F. S.). Class "C" intangible personal property is defined as "notes, bonds and other obligations . . . which are secured by mortgage, deed of trust or other lien upon real property situated in Florida." None of the above mentioned statutes or constitutional provisions expressly exempt the securities mentioned in the question above stated from taxes in this State.

If the securities are exempt from taxation it must be because of municipal issuance; for example, see §183.14, F. S. Whether or not there is some special or local statute or charter provision exempting the securities issued by a municipality from general taxation is a local question that usually is to be shown by the municipal charter or other local acts of the Legislature which are in the peculiar knowledge of the local authorities. Unless such a showing is made to the proper county official or officials such securities should be held subject to taxation.

January 19, 1954.—054-8.

TAXATION—PROMISSORY NOTES—LIEN IN DEED

QUESTION: Where promissory notes, representing a part of the purchase price of real property, are secured by an express lien contained in a deed of conveyance, is such a lien a "mortgage, deed of trust, or other lien" within the contemplation of §1, Article IX, of the State Const., and §199.02, F. S., so as to require the classification of said notes as Class "C" intangible personal property?

To: Honorable C. M. Gay, State Comptroller:

It is stipulated in the deed in question that "the parties of the first part hereby reserve and retain a vendors' lien on the

above described property to secure the payment of the following notes made by the party of the second part in favor of the parties of the first part," following which provision promissory notes (some negotiable, others non-negotiable) in the sum of several thousand dollars are identified. The deed also contains certain covenants with relation to this reservation of lien, including a provision for the payment of a reasonable attorney's fee by the parties of the second part in case of default.

So far as we are advised the grantee has accepted delivery of this deed and has taken possession of the property in question. The provision for lien in this instrument bears a similarity to that involved in *Wilson v. Davis*, 80 Fla. 727, 86 So. 686, where "the deed of conveyance executed by the grantor and his wife, and accepted by the grantee, contains the following: 'And the grantor hereby reserves unto himself a vendor's lien to secure the payment of the purchase money for said lands and timber rights, said lien being reserved to secure the sum of \$60,862.70, represented and evidenced by two certain promissory notes of even date the 28th of February, 1907, each in the sum of \$30,431.35, each bearing interest at the rate of 8 per cent per annum from date until paid,'" concerning which the court said: "In contemplation of law the grantee accepted the deed of conveyance of the lands subject to the lien expressed therein for the stated amount as the balance of the purchase price, and subsequent purchasers took conveyance of the lands with notice of and subject to the lien expressly reserved in the conveyance itself. 39 Cyc. 1792; 29 Am. & Eng. Ency. Law (2d Ed.) 780-782; 3 Devlin on Real Estate, §1235, p. 2325. *The reserved lien is in the nature of a mortgage lien* (McKeown v. Collins, 38 Fla. 276, 21 South. 103) . . ."

The above mentioned case was cited by the court in *Highland Crate Cooperative v. Guaranty Life Insurance Company*, 154 Fla. 332, 17 So. 2d 515, text 516, where the court remarked that a similar provision contained in a deed "was in effect a mortgage for the balance of the purchase price."

In the light of these holdings by the Supreme Court of Florida we feel that the lien contained in the deed is a "mortgage, deed of trust or other lien" within the contemplation of §1, Art. IX, of the State Consti., and §199.02 (3), F. S., and that the above question must be answered in the affirmative.

November 5, 1953.—053-301.

TAXATION—INTANGIBLE PERSONAL PROPERTY— ACCOUNTS RECEIVABLE

QUESTION: Are accounts receivable of professional persons, where such accounts receivable represent amounts owing to a person for professional services, distinguishable from that of a merchant or other kinds of accounts receivable on the ground that such accounts receivable amount to nothing more than income and are, therefore, not subject to assessment as intangible property?

To: Honorable C. M. Gay, State Comptroller:

Accounts receivable are assets of any person due on open account for goods, wares or merchandise, labor or services furnished to the debtor under contract, express or implied, for the payment thereof. There is no legal basis for any distinction between open accounts due and to be paid for goods, wares and merchandise furnished by a merchant and open accounts due and to be paid for services rendered by an artisan or a person engaged in the practice of a profession.

Accounts receivable constitute and are intangible personal property subject to taxation under the provisions of Ch. 199, F. S. (Reference—official opinion 053-121, June 8, 1953). In no event may an account receivable be classified as income so as to fall within the provisions of Art. IX, §11 of the State Const.

October 13, 1954.—054-235.

TAXATION—AGRICULTURAL COOPERATIVE MARKETING ASSOCIATIONS—ACCOUNTS RECEIVABLE—ASSESSMENT

QUESTIONS: 1. Are agricultural cooperative marketing associations, nonprofit corporations created under the provisions of Ch. 618, F.S., subject to assessment and levy of intangible personal property taxes upon Accounts Receivable owned by such corporations on the first day of January of the several tax years?

2. What method of procedure is indicated for ascertaining the amount of Accounts Receivable owned by such associations on the critical taxing date, and the determination of the true cash value thereof for the purpose of assessment?

To: Honorable C. M. Gay, State Comptroller:

Nothing appears in the Intangible Personal Property Tax Law of 1941 which indicates, either expressly or by mere implication, a legislative intention to exempt intangible personal property owned by an agricultural cooperative marketing association from the tax imposed thereby. The only property exempt from taxation by terms of the statutes is "intangible personal property belonging to the state of Florida or political subdivisions thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association", none of which several classifications include agricultural cooperative marketing associations, regardless of their character, as nonprofit corporations. The first question is accordingly answered affirmatively.

Credits, Accounts Receivable, and like obligations to pay money, are universally considered and held to be intangible personal property, subject to taxation under appropriate taxing statutes. The Intangible Personal Property Tax Law of 1941 imposes upon the State Comptroller the duty to ascertain by diligent search and inquiry whether all persons, firms and corporations have made proper returns of intangible personal property, and whether all intangible personal property subject to taxation has been assessed, and to advise the various tax assessors, charged with the duty of making such assessment, of his findings. The Comptroller is authorized, through persons employed by him to enable him to perform his statutory duties, to make inspection under reasonable conditions of the books of account and business records and ad-

ministrative records of all persons, firms and corporations subject to the imposition of the tax. He may, through such inspection or independent investigation through other sources, determine whether proper returns have been made of all taxable property, and whether such property has been lawfully assessed. The amount of Accounts Receivable, as shown on the books of account or other business records of the taxpayer, may be accepted by the Comptroller as the true cash value thereof, in the absence of information secured by him through other sources to the contrary.

It is a generally accepted principle of law of taxation that in the evaluation of credits or Accounts Receivable for the purpose of assessment and taxation as intangible personal property, a deduction of the bona fide indebtedness of a taxpayer from the amount of his taxable credits or Accounts Receivable is proper when and only when there is an applicable and effective statute so providing and authorizing such deduction. Chapter 199, F.S., contains no such provision nor any language from which such an intentment may be presumed. The same rule applies with regard to the assessment of intangible personal property as is applicable to the assessment for taxation of tangible personal property and real property, and the unalterable rule is that where property is assessable at its true cash value, that value is not subject to deductions on account of liens or other obligations created in connection therewith.

August 6, 1953.—053-188.

CLERKS OF CIRCUIT COURT AS AGENT FOR TAX
COLLECTOR—TAXES ON INSTRUMENTS—
COMPENSATION—AMENDED §199.11 (3), F. S.

QUESTIONS: 1. Is it mandatory, under §199.11 (3), F. S., as amended by Ch. 28272, Laws of Florida, Acts of 1953, that the Clerk of the Circuit Court collect the taxes mentioned in said subsection, as agent for the Tax Collector or otherwise?

2. Would it be legal for the clerk to collect the said taxes, make the report thereof to the Tax Collector and transmit the taxes so collected to the Tax Collector and receive from the Tax Collector as his (the Clerk's) compensation the fee paid the Tax Collector by the State Comptroller as soon as the Comptroller transmits the fee to the said Tax Collector?

To: *Honorable C. M. Gay, State Comptroller:*

Prior to the amendment of said subsection (3) of §199.11 F. S. by Ch. 28272, Laws of Florida, Acts of 1953, before a mortgage encumbering real property in this state could be accepted by the Clerk of the Circuit Court for recording the taxes levied on such mortgages by said subsection (3) of §199.11, F. S., had to be paid thereon to the County Tax Collector who was required to note the payment of such tax on said mortgage. The said 1953 amendment added the following to the said subsection:

“... The Class C intangible tax may be paid to the clerk of the circuit court at the time the mortgage, deed of trust or lien securing such indebtedness is presented

for recordation. *The clerk shall receive such payment in behalf of the county tax collector* and shall on the last day of the month transmit the monies to tax collector together with a list of all instruments upon which the tax was paid. The clerk shall upon receiving payment of the tax, place on such mortgage, deed of trust or the instrument evidencing such specific lien a notation showing the amount of tax levied by this subsection and received by him."

Although the above quoted portion of the amendment provides that the taxes "*may* be paid to the clerk of the circuit court" at the time the instrument is presented for recording, it is further provided that the clerk shall receive such payment in behalf of the county tax collector" and report the same to him as well as transmit the taxes so collected to him. The new matter added to the statute by the 1953 amendment is clearly for the benefit of the public and not for the public officials affected. The convenience of the public was doubtless uppermost in the mind of the Legislature when the amendment was adopted. Although the word "*may*" when used in a statute is usually held to be permissive and not mandatory (59 C. J. 1079, Section 635) a mandatory construction may be given to the word where public interests are concerned (59 C. J. 1082, Section 635). Permissive words are "peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest, or the rights of third persons" (Howell v. State, 77 Fla. 119, 81 So. 287, text 290 and 291). To the same effect see Appeal of Burnap, 94 Conn. 286, 108 A. 804; Simpson v. Winegar, Cr., 258 F. 562, text 563; Smalley v. Paine, 102 Tax. 304, 116 S. W. 38, text 39; Montgomery v. Henry, 144 Ala. 629, 39 So. 507, text 509; Smith v. Grand Rapids, 281 Mich. 235, 274 N. W. 776, text 779; Los Angeles County v. State, 64 Cal. App. 290, 222 P. 153, text 156; Shea v. Cwyhee County, Idaho, 156 P. 2d 331, text 333 and 334; Foster v. Brown, 199 Ga. 444, 34 S. E. 2d. 535. These observations indicate an affirmative answer to the first question.

Our examination of §199.11, F. S. as amended by the 1953 enactment reveals no provision therein for the payment of any compensation or fees to the Clerk of the Circuit Court for making the collection of taxes thereunder, reporting the same and paying over the funds collected as required by the said section as amended. Although subsection (5) of §193.65, F. S. which fixes the compensation of tax assessors and collectors generally, provides that the provisions of said section shall not apply to commissions on intangible personal property taxes, subsection, (2) of §199.31, F. S. appropriates from the intangible tax fund necessary funds for the fees of the county assessors and tax collectors allowed them by law for the assessment and collection of intangible personal property taxes. When this section was enacted all intangible personal property taxes were collected by the County Tax Collectors; while under the present laws a portion of the said taxes may and probably should be collected by the Clerk of the Circuit Court as agent for the Tax Collector. Under the new law the Clerk of the Circuit Court becomes ex officio a tax collector or

deputy tax collector. It is expressly stated that the clerk "receives such payment in behalf of the County Tax Collector," which must be either as agent of the Tax Collector or as his deputy.

In this state the duties of a public officer may be exacted without specific compensation (State v. Fussell, 157 Fla. 55, 24 So. 2d 804; Gavagan v. Marshall, 160 Fla. 154, 33 So. 2d 862) and public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided rendition of such services is deemed to be gratuitous (Rawles v. State, 98 Fla. 103, 122 So. 385; Gavagan v. Marshall, 160 Fla. 154, 33 So. 2d 862). Unless the Clerk is entitled to a fee by reason of receiving such payment in behalf of the County Tax Collector, evidently either as ex officio deputy or deputy, it is doubted that there is any statute providing for his receiving compensation for his services in connection with said Section 199.11, F. S. as amended.

As the Clerk receives "such payment in behalf of the Tax Collector," it would appear that he is by statute made the agent of the Tax Collector for the purpose of collecting the taxes mentioned in the statute. Receipts issued by him for the tax payments should probably be signed by the Clerk as agent for the Tax Collector, although by reason of the statute signature of a receipt by the clerk alone will doubtless be held as having been made for and in behalf of the Tax Collector. As the Clerk will be acting ex officio for the Tax Collector there appears to be no legal reason why the Tax Collector may not divide the compensation with the Clerk upon such terms as may be agreed to between them. As the Clerk is acting ex officio the compensation, if any, paid him by the Tax Collector will be income of the Clerk's office. This seems to answer the second question as well as it may be answered.

It is further suggested that the State Comptroller probably should provide rules and regulations for the issuing of forms for receipts to be issued by the Clerk for taxes paid to him.

July 17, 1953.—053-157.

INTANGIBLE PERSONAL PROPERTY—ANNUITIES— MORTGAGE—TAXABILITY

QUESTION: Where "A" enters into an agreement with "B" to pay said "B" the sum of one hundred twenty-five dollars per month so long as they both shall live, the payment of which sum is secured by a mortgage encumbering real property, upon what basis of value should the said mortgage be taxed under our intangible personal property taxing statutes?

To: Honorable C. M. Gay, State Comptroller:

Under the obligation to pay money in question "A" is obligated to pay "B" the sum of one hundred twenty-five dollars per month until the death of either "A" or "B" whichever is the earlier. Because of the uncertainties of life the above mentioned payments may not extend beyond the next scheduled payment while on the other hand they may extend for many years to come. It has been

held that an extension of a promissory note for the lifetime of the maker is valid, because the time fixed certainly must arrive *Metcalf v. Metcalf*, 219 Ill. App. 96). The obligation is in the nature of an annuity payable during the joint lifetime of two persons. The right to receive the monthly payments under the agreement appears to be a valuable one to "B", and property within the usually accepted sense (42 Am. Jur. 188, Section 3; 50 C. J. 729, Section 2). In this State an annuity has been held to be subject to our intangible personal property taxing laws (1933-4 Biennial Report 59; 1939-40 Biennial Report 471; 1941-2 Biennial Report 204; *Wood v. Ford*, Fla., 3 So. 2d. 490; 1951-2 Biennial Report 306). Where annuities are made subject to ad valorem taxes, the right to receive installment payments under a contract to pay money has usually been held subject to taxation (see Annotations in 150 A. L. R. 794 and 167 A. L. R. 1054). It seems that the value of the right to receive such payments must be ascertained by determining *the present value of the right*. It is here presumed that no part of the installment payments represents income from an investment on the part of "B" or a return of his property to him.

Although it may be said that the number of installments to be paid pursuant to the agreement is uncertain because conditioned upon the continuation of the lives of both "A" and "B", (see *Metropolis Publishing Company v. Lee*, 126 Fla. 107, 170 So. 442, involving a stamp tax), we do not think that there is such uncertainty as to prevent the ascertainment of the present value of the right to receive the annuity payments based upon the life expectancy of both "A" and "B". As the right to receive the payments will terminate with the death of either "A" or "B" we feel that the present value of the annuity should be determined on the basis of the shortest life expectancy, unless tables are available showing a definite joint expectancy that might be used. These observations seem to answer the above stated question.

Although the request for opinion requests that we advise the amount of the taxes due, we are unable to comply with that request as we are without the full information required to calculate the tax.

June 8, 1953.—053-121.

FOREIGN CORPORATIONS—ACCOUNTS RECEIVABLE—
TAXABILITY SITUS—CH. 199, F. S.

QUESTION: Are accounts receivable owing to a foreign corporation authorized by permit to transact business in the State of Florida arising from business transactions consummated through its authorized operating plants located in the state of Florida and accruing from the sale of products of the corporation to its customers in the state of Florida and throughout the United States and foreign markets, subject to intangible personal property tax imposed under the provisions of Ch. 199, F. S., where such sales and credits arising therefrom are subject to approval and acceptance by the corporation through its principal corporate office at the situs of its domicile?

To: Honorable C. M. Gay, State Comptroller:

The file submitted with your request for opinion relating to the liability of International Minerals & Chemical Corporation, a foreign corporation maintaining its principal place of business in the city of Chicago, Illinois, for intangible personal property tax levied for the years 1950 to 1953, inclusive, upon accounts receivable assessed against its agencies located at Bartow and Mulberry in Polk County, Florida, which are employed by it in the conduct of the corporate operations in the state of Florida, has been fully considered. From the information furnished thereby as to the business activities of the corporation within the State of Florida, the following conclusion was reached:

The accounts receivable due to the corporation by its debtors arising from business transactions conducted in the State of Florida through its agencies constitute and are intangible personal property subject to the state tax imposed under the provisions of Ch. 199, F. S. This conclusion is based upon a long unbroken line of decisions heretofore rendered by the Supreme Court of the United States in cases in which the question of the authority of the state to impose a tax of like nature has been raised in the light of the privileges and immunities granted and withheld under the terms and provisions of the Federal Constitution. Under these decisions it has been established as an invariable doctrine of the law that the state may, without contravening any right or privilege secured by the Federal Constitution, impose a tax for revenue upon bills receivable, obligations or credits arising from business transacted within the state at the business domicile of a non-resident corporation through its authorized agents or representatives. The Supreme Court of the United States in reaching its conclusion reasons that the state imposes the tax because of its need for revenue to be derived through it; it extends to the business the protection of the laws of the state and seeks to require the business to bear its just proportion of the burden of taxation. It is generally held that the situation would be unfortunate, not to say deplorable, if the state were left no choice between having to forego its needed revenue or else handicapping with the tax the business of her own citizens and home corporations in their competition with foreign corporations for the business to be done within her borders.

If the receivables under consideration are not paid the only recourse the creditor would have is by resort to the courts of Florida to enforce their collection. The credits would have no substance save for the permission of the State of Florida to incur them; they issued from the business transacted by the sanction of the state within its borders; the accounts are payable by persons domiciled within Florida, and there only the rights of the creditor may be enforced. If locality in the sense of subjection to sovereign power is to be attributed to these credits they must be localized at the place of incurrence of the debt. Their situs, if their taxability depends entirely upon situs, is at the locality at which the obligation was incurred.

The question is accordingly answered in the affirmative.

August 17, 1953.—053-202.

CORPORATIONS—INTANGIBLE PERSONAL PROPERTY—
TAXATION SITUS.

QUESTION: Under the provisions of Ch. 199, F. S. in a case where a foreign corporation authorized to transact business in the state of Florida has designated a location within a specified county as its principal place of business and maintains district or branch offices throughout the state and located in counties other than that designated as the location of its principal place of business, at which several locations the corporation's authorized agents direct the management of the corporation's affairs in the several localities or areas, through which intangible personal property is produced for the corporation, what is the situs for the purpose of taxation of such intangible personal property so produced, and what county officers, under the statute, are charged with the duty of assessment and collection of the tax?

To: *Honorable C. M. Gay, State Comptroller:*

The answer to the question presented requires the construction and interpretation of Ch. 199, F. S. that the purpose and intent of the Legislature in the enactment of the statute may be accomplished through its administration. In the determination of the legislative intent in the enactment of the statute, the law must be construed upon consideration of all of the sections, subsections and provisos appearing therein which are considered in solido.

The sections of Ch. 199, F. S. directed to the question presented are numbered 199.04, 199.07, 199.08, and 199.31 (5) (b).

Section 199.04 imposes upon the tax assessor of each and every county in the state the duty to prepare a separate tax roll to be designated as intangible personal property tax roll which shall distinctly show the name and address of the taxpayer and the amount of the valuation for tax purposes of intangible personal property assessed against such taxpayer upon the roll.

Section 199.07 requires that every person, firm or corporation in the state owning or having control, management or custody of intangible personal property which is subject to taxation to file a sworn return of the same with the county tax assessor in the proper county on or before the first day of April of each and every year, etc.

Section 199.08 requires that intangible personal property shall be assessed in the county where the taxpayer resides or has his usual domicile. In the case of corporations such property returns shall be assessed and levied in the county in which the corporation has its principal office or place of business.

Section 199.31 (5) (b) provides that from the intangible tax fund created through the collection of the taxes upon intangible personal property 25% of the net amount of the fund shall be paid to each county in proportion to the net amount of intangible personal property taxes received from the respective counties, and

such money shall be paid to the Board of County Commissioners of each county for use by the Board for county purposes.

The statute must be construed to the end that its purpose and the intent of the Legislature may be in all respects achieved. Any construction of the statute in its entirety which would result in depriving a county in which intangible personal property has an actual situs of the financial benefit of the statute would do violence to the established principles of the statutory construction.

Accordingly I construe the statute to mean that on the critical date of the tax year the duty is imposed upon each county tax assessor to enter upon the tax roll of such county all intangible personal property as defined by the statute having a situs in the respective counties and to assess such property at its full cash value, and impose upon the tax collector of the respective counties the duty to collect and remit the same to the State Comptroller to be covered in the intangible tax fund in the state treasury for distribution as directed by the statute.

The fact that a foreign corporation may designate in its application for a permit to transact business in this state a location at which its principal place of business shall be fixed is not determinative of the situs of intangible personal property physically located throughout the state and within the several counties for the purpose of assessment, collection and distribution in accordance with the law. The law requires that a return shall be made annually of intangible personal property for the purpose of taxation by every person, firm or corporation in the state owning or having control, management or custody of such intangible personal property. Inasmuch as the return is required to be made to the tax assessor of the several counties, it must be considered that it is the statutory duty of the corporation directly or through its authorized agent, to make return to the tax assessor for each county within which it exercises its corporate functions, of the intangible personal property owned by it and which is under the control, management or custody of its authorized officer or agent, within the several counties, for the purpose of assessment and taxation.

Intangible personal property of a foreign corporation authorized to do business in the state is taxable in the county or counties within which is located the actual business situs of such intangible property. In some cases the business situs of all such intangible property will be in the county where the principal office of the corporation is located. In other cases, by reason of the operating methods of the corporation, the business situs of all, or part of, such intangible property may be in another county or counties.

What was meant by the last sentence of opinion No. 053-202 was that a return of intangible property must be made by the corporation in the county of actual business situs of such intangible property.

Consequently, those corporations, the business situs of whose intangible property is in more than one county, will make returns for each county which is the business situs of any of their intangible property.

April 20, 1953.—053-85.

INTANGIBLE PERSONAL PROPERTY TAXATION—
U. S. TREASURY CERTIFICATES OF INDEBTEDNESS—
EXEMPTION—CH. 199, F. S.

QUESTION: Are United States Treasury Certificates of Indebtedness exempt from intangible personal property taxation by or under the Authority of the State of Florida (Ch. 199, F. S.)?

To: Honorable C. M. Gay, State Comptroller:

Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority (31 U. S. C. A., Sec. 742). This section on its face applies to written interest-bearing obligations issued pursuant to Congressional authorization. Stocks, bonds and Treasury notes are obviously of that nature. Certificates of indebtedness are exempt from taxation in any form by or under State, municipal, or local authority. (31 U. S. C. A., 769) Instrumentalities which the United States Supreme Court has held to be constitutionally exempt from state and local taxation, have been characterized by (1) written instruments, (2) the bearing of interest (3) a binding promise by the United States to pay specified sums at specified dates and (4) specific Congressional authorization, which also pledged the faith and credit of the United States in support of the promise to pay (Smith v. Davis, 323 U. S. 111; 89 L. Ed. 107).

It may be stated as a general rule that, as to individuals, public securities of the United States are exempt from ad valorem or personal property taxation by the states for any purpose (Anno. 94 L. Ed. 454; 51 Am. Jur. Taxation, Sec. 240.)

In the light of the foregoing observations we are of the opinion that the question should be answered in the affirmative.

September 9, 1954.—054-218.

TAXATION SITUS—PROPERTY HELD BY RESIDENT AND
NONRESIDENT TRUSTEES

QUESTION: Where intangible personal property is held by two or more trustees, some residents of this State and others nonresidents, what portion of said estate, if any, may be subjected to taxation in this State?

To: Honorable C. M. Gay, State Comptroller:

Intangibles having a tax situs in this State are subject to taxation (§1, Art. IX, State Const.; Ch. 199, F. S.,) unless exempted by law. Unless exempted from taxation "all personal property in this State, and all personal property belonging to per-

sons residents of this State, shall be subject to taxation." Trustees are required to make return of any intangibles held by them having a tax situs in this State (§199.07, F. S.,) to the tax assessor of the county of their usual domicile (§199.08, F. S.)

"The property of trust estates is, like other property subject to tax. As a general rule such property is assessed to the trustee as holder of the legal title and not to the settler or beneficiary" (84 C. J. S. 215, §100; 51 Am. Jur. 646, §692; 2 Cooley on Taxation, 4th Ed. 1048, §649, and 1273, §602); however, "if there are two or more trustees, and a part of them reside in one state and a part in another state, the general rule is that the assessment of the property should be apportioned among them according to the relative number in the taxing state, in the absence of any statute to the contrary" (2 Cooley on Taxation, 4th Ed., 1052, §470; 84 C. J. S. 216, §100; 51 Am. Jur. 493, §484), but "where there are several trustees, one of whom is domiciled in the State of origin of the trust, and the corporate custody of the securities of the trust is with that trustee at his domicile, and *the title of the trustees is joint and their powers must be exercised as a unit*, there is no such severable ownership in one trustee resident outside of the State where the trust was created, as makes him subject to taxation, unless so provided by statute" (2 Cooley on Taxation, 4th Ed., 1053, §470, citing *Newcomb v. Paige*, 224 Mass. 516, 113 N. E. 458).

The Florida Supreme Court, in *Florida National Bank v. Simpson*, 59 So. 2d 751, text 767, approved the following "rule as stated by Bogart on Trusts and Trustees, Volume 2, §262, page 842: 'where there are two or more trustees residing in different states, the courts are in fairly general agreement, where a different rule is not established by statute, that the property will be taxable in the state of residence of the trustee who has actual custody or control of it.' " This statement is supported by the author citing certain cases from Massachusetts (including *Newcomb v. Paige*, supra), New York, Ohio and Oregon courts. In *Re. Durance*, 333 Pa. 162, 3 A. 2d 682, 127 A. L. R. 366, the court after stating that it found that certain trustees held "the trust property as a unit in the State of New Jersey," and not as tenants in common, remarked that "cases from states in which trustees hold as tenants in common may also be passed over, because the interest of a tenant in common is essentially different from that of a joint tenant." In this connection see also annotations in 67 A. L. R. 400-403.

From the above and foregoing we gather that where two or more trustees hold intangible personal property as tenants in common their titles are severable for purposes of taxation, but where their title is joint and their powers must be exercised as a unit their titles are not usually severable for purposes of taxation; and the circumstances in each case must be considered in determining where such trust estate is subject to taxation. The actual custody of the evidence of the intangibles seems to bear upon this question and should be considered. These elements appear to have received consideration in the opinion in *Florida National Bank v. Simpson*, supra.

The trust estate mentioned in your request for opinion was created and established under the statutes and laws of the State of Missouri sometime prior to January 1, 1954, and the trustor thereof (who is also one of the trustees) has since become a citizen and resident of Florida. The trust estate consists of shares of stock and other intangibles over which the two trustees, one a trust company organized and existing under the statutes and laws of Missouri, and the other an individual resident and citizen of Florida, have "full power and authority to manage and control . . . and to sell, exchange, lease, rent, mortgage, pledge, assign, transfer and otherwise dispose of (the trust estate) or any part thereof, upon such terms and conditions as they may see fit" The trustees appear to have the usual powers given trustees of living trusts. The stock certificates and other evidence of the trust intangibles are held and kept in Missouri. Statutes of Missouri relative to joint estates appear to have been construed to be rules of construction (*State v. Hostetter*, 344 Mo. 665, 127 SW 2d 697; *McVey v. Phillips*, Mo. 259 SW 1065) and it appears that joint tenancies in bank accounts may exist in that state (*Melinik v. Meier*, Mo. App. 124 SW 2d 594). It must, therefore, be presumed that joint estates in intangibles may exist under the statutes and laws of Missouri.

We have examined a copy of one of the three identical trust instruments and from such examination conclude that the two trustees hold title as joint tenants and not tenants in common. So far as we are advised the corporate trustee is not qualified to transact a trust business within this state; this being true, any action taken by it in this connection must be taken beyond the borders of the State of Florida. We find nothing in the trust instrument authorizing separate action or control of the trust property, or any part of it, by the individual trustee in this or any other state. The action by the trustees must be joint and may not be several when acting under the trust instrument, at least so long as the grantor shall live; and it further seems that the trust is vested irrevocably. Should the situs of the trust be in Florida, the corporate trustee could not act unless and until duly qualified to transact business in this state; we should not presume any such contemplation by the said trust instrument. We, therefore, feel that the situs of the trust property in this instance is in the State of Missouri and that no part of it is in Florida. This is an active and not a passive or dry trust.

The above question is, therefore, answered by stating that only the portion of a trust estate having an actual situs in this state is subject to taxation by this State. Although the fact that one of several trustees resides in this State raises *prima facie* evidence that the situs of a portion of the trust is in this State, such evidence may be overcome by showing actual situs elsewhere. Although a beneficiary may reside in this State, such fact gives no right of taxation in this State, at least until legislation is provided for the taxation of the interest of a *cestui que trust*. We do not think that the trust estate mentioned in the request for opinion has any taxable situs in this State.

TANGIBLE PERSONAL PROPERTY TAXATION

December 28, 1953.—053-339.

**ASSESSMENT AND TAXATION—RACE HORSES—
NONRESIDENT OWNERS**

QUESTION: Where the nonresident owner of a race horse brings the same into this state prior to January first of a tax year and registers said horse with the Florida Racing Commission for racing during the current racing season, is the said race horse subject to taxation in this state for said tax year?

To: Honorable John A. Gautier, Dade County Tax Assessor, Miami, Florida:

Under §200.13, F. S., the county tax assessor is required to enter upon the tangible personal property tax roll the name of all persons who have located in the county tangible personal property and also "all taxable tangible personal property usually kept and located in the county, the ownership of which is unknown to him. . ." It is stated in 51 Am. Jur. 468, §453, that "before tangible personal property may be taxed in a state other than the domicile of the owner, it must have acquired a more or less permanent location in the state, not merely a transient or temporary one. Generally, chattels merely temporarily or transiently within the limits of a state are not subject to property taxes. Tangible personal property passing through, or in the state for temporary purposes only, if it belongs to a nonresident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. The state of origin remains the permanent situs of property for the purpose of taxation, notwithstanding the occasional excursion of the property to foreign parts." See also annotation in 110 A. L. R. page 717 and Guinness v. King County, 32 Wash. 2d 503, 202 P. 2d 737, 6 A. L. R. 2d. 1361 and annotation thereto concerning boats.

The question appears to be primarily one of fact to be determined by the tax assessor; that is whether the tangible personal property in question has or has not acquired a more or less permanent location in the state, not merely a transient or temporary one. If the property has acquired a more or less permanent location in the state it is subject to taxation, but if it is in the state on a transient or temporary basis it is not subject to taxation.

EXCISE TAX ON DOCUMENTS

February 12, 1954.—054-30.

**DOCUMENTARY STAMP TAX—CONVEYANCE OF
INTERESTS IN REAL PROPERTY—CONSIDERATION**

QUESTION: What is the interpretation and construction of §201.02, F. S., imposing documentary stamp tax upon conveyance of real property or of an interest therein?

To: Honorable C. M. Gay, State Comptroller:

"A deed is given and the consideration is love and affection and the property conveyed has a mortgage or indebtedness against it, the grantee takes the deed either subject to the mortgage or agrees to assume the mortgage. Under these circumstances the grantee, if he takes the deed subject to the mortgage, certainly would have to pay off the mortgage before he would have clear title. If he assumes the mortgage he thereby agrees to pay it off. In either instance it would seem that there is a valuable consideration."

The answer to your question would appear to fall within the construction and interpretation applied to the subject section of the statutes by the Supreme Court of Florida in its decision in the case of DeVore vs. Gay, reported in 39 So. 2d 796, and followed by its decision in the recent case of Culbreath vs. Reid, reported in 65 So. 2d 556.

In the former case the court held that the tax imposed by the subject statute is measured by the monetary consideration paid for the conveyance, and that the tax is confined to the actual monetary consideration or a consideration which has a reasonably determinable pecuniary value. In the latter case the court reaffirmed its construction of the statute to be that the tax is imposed only upon transfers of realty or any interest therein for monetary consideration. The court further held that "where love and affection constitutes the only consideration for a conveyance of realty to a grantor's daughter and she paid nothing for the deed and was not obligated to pay to the grantor anything of value therefor, the deed was not subject to documentary stamp tax, since the transfer was not for a monetary consideration." It is clear from the construction of the statute applied by the Supreme Court that the taxability of a deed of conveyance to lands is not dependent upon the nature or the quality or quantity of the title conveyed, but is dependent only upon the monetary consideration paid by the grantee for the interest acquired in such real property. The grant or conveyance of realty which is charged with the lien of a mortgage or other encumbrance is a grant upon condition which is subject to forfeiture upon the breach of the condition to discharge the lien by payment. The assumption of the payment of the lien is not a part of the consideration for the grant which may be considered as having a monetary value.

Where a conveyance of property is made upon the consideration of love and affection, the grantee takes only such interest or title as the grantor has in the property at the time of the conveyance, for which the grantee pays no monetary consideration, which is the sole basis for the computation of the tax according to the judicial interpretation of the statute. The tax is not computable upon the "valuable" consideration for the transfer but upon the pecuniary or monetary consideration.

Under the circumstances upon which your inquiry is predi-

cated, the grantee is not a purchaser nor is there any monetary consideration upon which the amount of tax may be computed.

It is my opinion that under the circumstances related, no tax may be imposed upon the subject conveyance.

August 19, 1953.—053-207.

DOCUMENTARY STAMP TAXES—CERTIFICATE OF TITLE

QUESTIONS: 1. Are "Certificates of Title" issued by a Clerk of the Circuit Court in this State within the purview of §3482, Title 26, of the United States Code, and §201.02 F. S., so as to require documentary stamp taxes?

2. If the Clerk must place documentary stamp taxes on such "Certificates of Title", is the amount of the consideration for the conveyance the amount bid at the sale and paid by the purchaser?

3. If the Clerk is required to place either, or both, Federal or State Revenue Stamps on the "Certificates of Title" who pays the costs of these stamps?

4. Are the "certificates of title" an *instrument other than mortgages conveying, or purporting to convey, any interest in real property*, within the meaning of §§695.21-695.23, F. S., requiring the Clerk to ascertain the correct Post Office address of the purchaser and include the same in the daily schedule of deeds and conveyances he furnished the county tax assessor?

5. If the Clerk must report the "Certificates of Title" to the County tax Assessor, does he receive the 10 cent fee (25 cents in Duval County under the 1953 population act) for doing so prescribed in §695.23, F. S.?

6. From what source does the Clerk obtain the money for paying the cost of publishing the Notice of Sale required in §702.02, F. S., as amended?

To: *Honorable Leonard W. Thomas, Clerk Circuit Court, County Court House, Jacksonville, Florida:*

The question of the application of §3482, Title 26, of the United States Code, to "Certificates of Title" issued pursuant to §702.02, F. S., as amended by Ch. 28093, Laws of Florida, Acts of 1953, has been answered in the affirmative by an opinion rendered by the Acting Commissioner of Internal Revenue, of the Treasury Department of the United States, on August 12, 1953. The question of the applicability of the federal courts and authorities, and there appearing no material question of constitutionality of the federal statute, we accept the opinion of the Acting Commissioner as being a correct statement of the law. As the Florida documentary stamp taxing statute was taken in a large part from the federal statute the construction placed upon the federal statute by the federal authorities is highly persuasive in construing the state statute taken from the federal one (*State v. Cook*, 108 Fla. 157, 146 So. 223). *The first question* is, therefore, answered in the affirmative.

Under §112.83 or Regulation 71, by the Commissioner of Internal Revenue of the Treasury Department of the United States, relative to documentary stamp taxes under the federal statutes, "the tax is computed on the amount bid for the purchase of the property plus the costs if paid by the purchaser . . ." This appears to be a reasonable rule to be followed under both the federal and state statutes. *The second question*, is, therefore, answered in the affirmative unless there are other amounts to be paid by the purchaser, such as court costs, in addition to the amount bid, in which case such additional expenses should be included.

Subsection (2) of §702.02, F. S., as amended, provides that "for his service in making such sale, the clerk shall receive a fee of five dollars." This fee was doubtless intended to compensate the clerk's office for the services performed by the clerk in connection with the sale of the mortgaged property. This fee seems to be in addition to that fee or fees received by the clerk for filing papers and other services usually performed by the clerk, but are received by him in the same capacity. These fees may not be used in paying for revenue stamps, either federal or state which are usually considered as being part of the cost of the litigation. The obligation for furnishing stamps has not been changed by the 1951 amendment to §702.02, F. S. Such stamps are part of the costs and expenses for transferring title from the mortgagor to the mortgagee or his assignee. *The third question* is, therefore, answered by stating that the party responsible for stamps on a master's deed continues to be liable for such expenses under §702.02, F. S., as amended. Usually such expenses should be paid from the proceeds of the sale.

Section 695.21, F. S., requires that "it shall be the duty of the several clerks of the circuit courts to ascertain of all persons presenting for public record any instrument *other than mortgages* conveying or purporting to convey any interest in real estate the correct post office address of the grantee or grantees named in such instrument, and it shall be the duty of the person presenting such instrument for recordation to furnish such information to said official." The "Certificates of Title" appear to be such instruments. This information is required to be passed on, by the clerk, to the county assessor of taxes, together with a description of the property conveyed (§695.22, F. S.) for which services the clerk is required to collect a fee of ten cents (§695.23, F. S.). This fee seems to be assessed against the person offering the instrument for record. *The fourth question* is, therefore, answered in the affirmative. Although technically the ten cent fee should be collected from the purchaser at the sale it might be, with the court's consent, included in the report of costs and expenses of sale.

The fifth question is, on the basis of our observations made as to the fourth question, answered in the affirmative.

The notice of sale required, by subsection (2) of §702.02, F. S., as amended, to be published by the clerk is a counterpart to the notice of sale heretofore published by masters in chancery appointed by the court to conduct sales under foreclosure de-

crees and make conveyances pursuant to such sales. The clerk is by statute, although not so named, made a standing master of the court for such purposes. As such costs were heretofore paid from the proceeds of the sale, as costs and expenses of the proceedings, we see no reason why the expenses incurred by the clerk in publishing the notice of sale should not be treated in the same way as were the costs of such notices published by the masters in chancery under the former practice. Until the question is finally determined by the court it is suggested that the costs and expenses of publication of the notice be included in the clerk's report of sale as an item or expense of such sale paid, or to be paid, from the proceeds of such sale. Often special masters and the like required the plaintiff to advance such costs at least in cases where there may have been doubt as to whether the property on sale would bring enough to pay the costs. Sometimes, in the past, mortgage sales made subject to one or more other mortgages brought very little at foreclosure sale; this is not a legal observation but a practical suggestion to the clerk. These observations seem to answer *the sixth question*.

December 11, 1953.—053-327.

DOCUMENTARY STAMP TAX—INSTRUMENTS—
COLLATERAL AGREEMENT BETWEEN
BANK AND CORPORATION

QUESTION: Is an agreement in writing between a corporation and a bank, under the terms of which the bank agrees to loan and the corporation agrees to borrow money for corporate uses from time to time, and to secure the repayment thereof, together with interest at an agreed rate for the use thereof, by pledge of collateral security to the bank by the borrower, a "written obligation to pay money" within the provisions of §201.08, F. S., imposing a documentary excise tax upon such instruments?

To: *Honorable C. M. Gay, State Comptroller:*

The form of written instruments submitted with your request for opinion have been reviewed and applied to the legal interpretation and construction of the applicable statute. A study of the form entitled "Collateral Agreement" shows that the form is, when completed, in substance nothing more than a contract between a bank and a corporation, in which the bank contracts to make advances to the corporation, and the corporation pledges with the bank property of various kinds as collateral security to secure the payment of such loan, or loans, as may be made by the bank to the corporation under the terms of the agreement. The short form attached is to be used by the corporation when requesting the bank for future advances under the Collateral Agreement or Contract.

Section 201.08, F. S., provides:

"Tax on promissory notes, written obligations to pay money, assignments of wages, etc.—On promissory notes, non-negotiable notes, written obligations to pay money,

assignment of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, the tax shall be ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate."

The Collateral Agreement submitted along with the request for opinion, when executed does not, in and of itself, constitute any written obligation to pay money, and assuming that there may be an implied obligation to make advances under the terms of the agreement or contract, no sum certain is set forth in the agreement and it is quite possible that under such an agreement or contract, no advances would ever be made because the corporation may not request of the bank that advances be made.

In construing §201.08, F. S., the United States Circuit Court of Appeals, Fifth Circuit, in the case of *Lee, State Comptroller vs. Keenan*, 78 F. 2d 425, held that an obligation to pay money usually refers to a direct written promise to pay a *stated* sum and not to the duty to pay an amount that may be established by proof of extrinsic facts. That case involved a contract for the sale of electric current over a period of years, and in holding that such contract was not an obligation to pay money within the meaning of the statute, said:

"The contract is to run five years, but is terminable on the discharge of the receivers. This paper is not a written obligation to pay money within the meaning of the statute. It does not fix a debt and promise its payment. It is only an executory agreement for the sale of a commodity, and no obligation to pay money arises under it unless and until the commodity is delivered. The city could recover no money of the receivers by merely pleading and proving this contract, but would have to allege and prove the delivery of a certain amount of electric current and the adjustments of the price . . ."

This contract on its face is not a direct obligation to pay money, but one to take electric current on certain conditions. On doing that, an obligation to pay money will arise. No one can tell from the face of this paper what amount of money, if any, will become due under it. If one should at its execution attempt to stamp it, he could not tell what amount of stamps should be affixed. As a legal term, the word "obligation" originally meant a sealed bond, but it now extends to any certain written promise to pay money or do a specific thing. In statutes an obligation to pay money usually refers to a direct written promise to pay a stated sum and not to the duty to pay that may be established by proof of extrinsic facts. See *Karasik v. People's Trust Co. (D. C.)* 252 F. 324, affirmed (C. C. A.) 252 F. 337; *Munzinger v. United Press*, 52, App. Div.

338, 65 N. Y. 194, approved in *Tierney v. J. C. Dowd & Co.*,
238 N. Y. 282, 144 N. E. 583"

In *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, the Supreme Court of Florida held that agreements whereby newspapers secured advertising space to customers who agreed to pay for space, after advertising had been run, on sliding scale according to amount of space used, were not subject to documentary excise tax, since agreements were on their face merely executory agreements to purchase space, and did not fix a debt. In that case, the court said that a stamp tax can not be sustained under this statute unless transaction is clearly within the terms of the statute and that statute levying and imposing excise tax on documents must be strictly construed and all doubts and ambiguities resolved in favor of taxpayer.

The agreement or contract involved in the instant question is nothing more than an executory contract to make a loan or advance to the corporation upon the request of the corporation, either specifically or by implication, and no debt or obligation to pay money in an amount certain exists under the terms of the agreement or contract.

If, and when, the bank should make future advances to the contracting corporation under the terms of the agreement, there would, at that time, be created a debt in a sum certain owing from the corporation to the bank, which debt, it would seem, would amount to an obligation to pay money.

These observations and the foregoing authorities lead us to the conclusion that an agreement or contract by a bank to make further advances to a corporation is not subject to the tax provided for in §201.08, F. S. We do think, however, that the instrument, which is given the bank when it makes advances under the terms of the agreement, when read in connection with the agreement, is "a written obligation to pay money" within the purview of §201.08, F. S., and therefore taxable.

We think, in the light of the foregoing observations, that the question should be answered in the negative.

October 4, 1954.—054-230.

DOCUMENTARY STAMP TAX—COLLATERAL AGREEMENT BETWEEN BANK AND CORPORATION

QUESTION: Is an agreement in writing between a corporation and a bank, under the terms of which the bank agrees to loan and the corporation agrees to borrow money for corporate uses from time to time, and to secure the repayment thereof, together with interest at an agreed rate for the use thereof, by pledge of collateral security to the bank by the borrower, a "written obligation to pay money" within the provisions of §201.08, F.S., imposing a documentary excise tax upon such instruments?

To: *Honorable C. M. Gay, State Comptroller:*

The file submitted with the request for this opinion shows

that it is the intention of the bank to make advances under the agreement upon oral requests, with written requests being completely eliminated.

The form of written instrument submitted with your request for opinion has been reviewed and applied to the legal interpretation and construction of the applicable statute. A study of the form entitled "Collateral Agreement" shows that the form is, when completed, in substance nothing more than a contract between a bank and a corporation, in which the bank contracts to make advances to the corporation, and the corporation pledges with the bank property of various kinds as collateral security to secure the payment of such loan, or loans, as may be made by the bank to the corporation under the terms of the agreement.

Section 201.08, F.S., provides:

"Tax on promissory notes, written obligations to pay money, assignments of wages, etc.—On promissory notes, non-negotiable notes, written obligations to pay money, assignment of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, the tax shall be ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate."

The Collateral Agreement submitted along with the request for opinion, when executed does not, in and of itself, constitute any written obligation to pay money, and assuming that there may be an implied obligation to make advances under the terms of the agreement or contract, no sum certain is set forth in the agreement and it is quite possible that under such an agreement or contract, no advances would ever be made because the corporation may not request of the bank that advances be made.

In construing §201.08, F.S., the United States Circuit Court of Appeals, Fifth Circuit, in the case of *Lee, State Comptroller vs. Keenan*, 78 F. 2d 425, held that an obligation to pay money usually refers to a direct written promise to pay a *stated* sum and not to the duty to pay an amount that may be established by proof of extrinsic facts. That case involved a contract for the sale of electric current over a period of years. The court held that the contract did not fix a debt and promise its payment, and was not an obligation to pay money within the meaning of the statute.

In *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, the Supreme Court of Florida held that agreements whereby newspapers secured advertising space to customers who agreed to pay for space, after advertising had been run, on sliding scale according to amount of space used, were not subject to documentary excise tax, since agreements were on their face merely executory agreements to purchase space, and did not fix a debt. In that case, the court said that a stamp tax can not be sustained under this statute unless transaction is clearly within the terms of the statute and that statute levying and imposing excise tax on documents

must be strictly construed and all doubts and ambiguities resolved in favor of taxpayer.

The agreement or contract involved in the instant question is nothing more than an executory contract to make a loan or advance to the corporation upon the request of the corporation, either specifically or by implication, and no debt or obligation to pay money in an amount certain exists under the terms of the agreement or contract.

These observations and the foregoing authorities lead us to the conclusion that an agreement or contract by a bank to make further advances to a corporation is not subject to the tax provided for in §201.08, F.S.

This opinion is not intended to and does not alter or modify opinion number 053-327, rendered by this office on December 11, 1953. The conclusions reached in this opinion and that opinion are identical, except that we held in opinion number 053-327 that an instrument which the borrower gave the bank when it made advances under an agreement similar to the agreement here involved, when read in connection with the Collateral Agreement, was "a written obligation to pay money", within the purview of §201.08, F.S., and was subject to our documentary stamp tax.

December 14, 1953.—053-331.

DOCUMENTARY STAMP TAXES—CONVEYANCES— CORPORATION DISSOLUTION

QUESTION: Where, in connection with the dissolution of a corporation, the real property of the said corporation is conveyed to its stockholders in exchange for the corporate stock held by them and in proportion to the amount of stock so held, are the said conveyances subject to our documentary stamp tax statute, that is, Ch. 201, F. S.?

To: *Honorable C. M. Gay, State Comptroller:*

The above question was answered in the affirmative by an opinion of this office rendered on March 18, 1936 (1935-6 Biennial Report 28) under the terms and provisions of Ch. 14787, Laws of Florida, Acts of 1931, from which present Ch. 201, F. S., was derived. This opinion is in the nature of a reconsideration of the said opinion in the light of subsequent decisions of our Supreme Court construing said Ch. 201, F. S.

Probably the latest decision of the Supreme Court construing said Ch. 201, F. S., is *Culbreath v. Reid*, Fla. 65 So. 2d. 556, text 557, where the court remarked that "the statute in question applies only to a monetary consideration." This case involved a deed of conveyance where the consideration therefor was the "love and affection" of the grantee for the grantor, said grantee being the daughter of the grantor. In *DeVore v. Gay*, 158 Fla. 608, 39 So. 2d 796, which involved a long time lease with the consideration therefor being based upon a monthly rental, it was held that

the tax was to be measured by the cash payment made and that the future monthly installments for, or in the nature of, rent could not be taken into consideration. The cash payment and not the value of the lease was the measure of the documentary stamp taxes to be paid. It was held that such taxes "should be confined to the actual monetary consideration or to considerations which have a reasonably determinable pecuniary value." Contracts relating to printing to be done in the future and to be paid for in the future dependent upon the amount of printing to be done (*Metropolis Publishing Company v. Lee*, 126 Fla. 107, 170 So. 442) and contracts for the future use of electricity, the same to be paid for as furnished, (*Bankers Trust Company v. Florida East Coast Railroad Company*, DC Fla. 8 Fed. Supp. 874, affirmed 78 Fed. 2d 425) are not taxable as to future purchases; the taxes being based upon present consideration paid and not present worth.

This brings us to the question of whether in the exchange of lands for corporate stock, as above set out, there was an actual monetary consideration (*Culbreath v. Reid*, supra) or a consideration which has a reasonable determinable pecuniary value, (*DeVore v. Gay*, supra). The consideration being an exchange of stock for real property, there was no actual monetary consideration; but was there a consideration that has a reasonable determinable pecuniary value? Under prior statutes of this state (Sections 610.18, 610.37, 611.34, 612.48, 612.49 and 612.52, F. S.) when a corporation became dissolved for any reason the real property of the corporation vested in the board of directors as trustees for the creditors and stockholders, and such appears to be the present law §1, Ch. 28170, Laws of Florida, Acts of 1953, as the same adds §608.30, F. S.), for the purpose of liquidation and distribution to the persons entitled thereto. "On dissolution . . . stockholders are entitled to share ratably in the surplus of the corporate property remaining after the payment of debts . . . Stockholders are entitled to a distribution of the surplus assets after payment of creditors, no matter how small that surplus may be . . . The right to share in the distribution belongs to all members or stockholders of record at the time of distribution . . ." (19 C. J. S. 1554-1555, §1767). There appears to be a distinction between a distribution of the surplus assets of the corporation in connection with liquidation or dissolution, and the purchase of its outstanding stock by a corporation with a portion of its assets. The first case is a distribution of the assets of the corporation to its stockholders as their interests may appear; the other is the sale or exchange of corporate assets. In the first case the value of the stock is of little concern; while in the second case the value of the stock transferred and of the property used in its purchase must be of substantially the same value. Distribution upon dissolution may be based on the par value of the stock, or even the number of shares outstanding, without little if any regard to actual value; while in the purchase of stock with assets the value of both must be taken into consideration. In this connection see *Tide Water Associated Oil Company v. Jones*, DC Okla. 57 Fed. Supp. 482; *Socony Vacuum Oil Company v. Sheehan*, CCA, 144 Fed. 2d 252, involving the federal statute, in which it was held, under similar circumstances, that

there was no taxable sale. Conveyances in connection with the merger of two corporations were held not taxable under the federal statutes in *U. S. v. Seattle-First National Bank*, 321 U. S. 583, 64 S. Ct. 713, 88 L. Ed. 944.

In the light of the above and foregoing authorities and observations we doubt that the facts in the above stated question involve an actual monetary consideration or a consideration which has a reasonably determinable pecuniary value, within the purview of *Culbreath v. Reid*, supra, and *DeVore v. Gay*, supra. This opinion must be confined strictly to the question as above stated and may not be extended to the purchase of corporate stock by a corporation with any of its property, real or personal.

The above question is answered in the negative.

LICENSE TAXES

February 15, 1954.—054-29.

LICENSE TAXES—COMMODITIES— INTERSTATE TRANSPORTATION

QUESTION: Where a commodity, including plans and specifications for industrial and marine boilers, is produced or manufactured in this State for interstate transportation, may the manufacturer or producer of such commodity be required to obtain an occupational license and pay a license tax as a condition precedent to doing the business of producing or manufacturing such commodity in this State?

To: *Honorable C. M. Gay, State Comptroller:*

We gather from your file that the question is suggested by reason of a manufacturer of industrial and marine boilers (who manufactures such boilers in other states according to plans and specifications produced in this State) maintaining drafting offices in three counties of this State; one at Miami, one at St. Petersburg, and one at Tampa, Florida. It seems that when an order for a boiler is obtained an investigation is made to ascertain the boiler requirements and the information is furnished one of the drafting offices in this State, which drafting office, based upon such information, produces the necessary plans and specifications which are sent by mail, express or otherwise to the manufacturing plant in another state where a boiler is manufactured according thereto and which boiler is then shipped to the place of installation, which, in many cases, will be a third state. These plans become a completed and finished product in this State before moving in interstate commerce, although the information from which they were produced may have moved in interstate commerce before their manufacture or production was commenced.

These plans and specifications are produced or manufactured within this State and do not move in interstate commerce until after they are completed and placed in the mail or express for

interstate transportation. Although produced for interstate commerce, the said plans do not get into interstate commerce until after they have been completed in this State. Such plans and specifications do not acquire the character of a commodity in interstate commerce until after they are completed in this State and ready for use. These facts are similar to the raising of oranges for interstate shipment (*C. V. Floyd Fruit Company v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248), the cutting and floating of logs to point of interstate shipment (*Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715), the operation of a cotton compress (*Federal Warehouse and Warehouse Company v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622), the production of natural gas (*Hope Natural Gas Company v. Hall*, 274 U. S. 284, 47 S. Ct. 639, 71 L. Ed. 1049) and similar cases where the commodities produced moved in interstate commerce. Here the producer of the commodity engages in local or domestic business in the manufacture thereof and interstate commerce is indirectly and not directly affected in so far as the production of the plans and specifications are concerned (see 15 C. J. S. 472, Section 114).

In the light of these authorities and observations, we feel that the above question should be answered in the affirmative. We doubt that the production of plans and specifications, as above mentioned, constitutes a public service (§205.53, F. S.), but might be classified as manufacturing of plans and specifications (§205.48, F. S.), but if not otherwise subject to classification under a particular section of Ch. 205, F. S., would be a business not otherwise classified under §205.49, F. S. The tax collector should make the classification from the facts in each case.

January 19, 1954.—054-7.

LICENSES AND LICENSE TAXES— INSURANCE ADJUSTERS

QUESTION: Are persons licensed under Ch. 28074, Laws of Florida, Acts of 1953, as insurance adjusters, required to obtain occupational licenses under Ch. 205, F. S., notwithstanding they hold licenses issued under and pursuant to said Ch. 28074?

To: *Honorable C. M. Gay, State Comptroller:*

Chapter 28074, Laws of Florida, Acts of 1953, appears to have been designed "to protect the interest of the public with respect to insurance adjusters; to regulate the conduct of the business of insurance adjusters; to provide for the examining and licensing of insurance adjusters . . ." (see the title to said act). For one to be issued an insurance adjusters license under the said enactment he must be possessed of certain qualifications and must stand an examination relative to his training as an insurance adjuster within his field of operation. The Insurance Commissioner of Florida administers the act and has authority to revoke, suspend or refuse to renew licenses for cause (see §§14 and 15 of the act). The act appears to not only require an examination fee of all applicants for examination, but also an annual license fee of all licensed insurance adjusters. Although there is

no express appropriation of the license fees collected under the act, it is presumed that such fees are payable into the General Revenue Fund of the State and become a part thereof. As the expenses of the operation of the office of the Insurance Commissioner are paid from the General Revenue Fund pursuant to appropriations made by the Legislature, it follows that the costs and expenses of the regulation of insurance adjusters under said Ch. 28074 are payable from the said General Revenue Fund. There is nothing in the act to indicate that the license fees provided by §19 of the said act are taxes for the purpose of revenue instead of taxes for the purpose of reimbursing the General Revenue Fund for expenses of regulation paid from such fund.

Section 205.13, F. S., provides that "fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law." It is not clearly otherwise expressly provided by law in Ch. 28074, Laws of Florida, Acts of 1953, that the license fees therein provided for are in lieu of ordinary occupational license taxes.

The above stated question is, therefore, answered in the affirmative.

March 17, 1954.—054-65.

LICENSE TAXES—TELEVISION BROADCASTING STATIONS

QUESTION: Are television broadcasting stations operating in this state subject to occupational license taxes under Ch. 205, F. S., and similar statutes and laws?

To: *Honorable C. M. Gay, State Comptroller:*

Television waves are of such nature that they travel far from the station where they are broadcast, although with a natural diminution of strength as the impulses are diffused over a widening area. Broadcasts sent out by stations in Jacksonville, Miami, and other locations in Florida, have been received with success here in Tallahassee, as also have broadcasts sent out in Atlanta, Georgia, New Orleans, Louisiana, and from places in Texas and other states. Doubtless impulses sent out by a television station in Florida may be received, with more or less success, in other states and countries, so that such broadcasts become more or less transmissions in interstate commerce. Such broadcasts are regulated and controlled almost entirely by an agency of the United States, as is also the location of the station, its power, frequency, etc.

We feel that the average television broadcasts are intrastate as well as interstate; part of commercial broadcasts having a local and part an interstate advantage for its sponsor. It might be that under proper statutory provisions, separating the intrastate from the interstate business and placing a license tax upon the doing of the intrastate portion of the business would be a

valid license tax (see *Bear v. Vinsonhaler*, 215 Ark. 389, 221 S. W. 2d 3, appeal dismissed for want of a substantial federal question, 338 U. S. 863, 70 S. Ct. 146, 94 L. Ed. 529); however, there is no Florida statute placing a license tax expressly upon the intrastate business of television stations as distinguished from the interstate portion of the business, as did the Arkansas statute involved in the last above cited case.

The general rule is that the business of radio and similar broadcasting being largely an interstate business is not subject to licenses and similar taxes where no provision is made for the segregation of the intrastate business from the interstate business (Annotation in 11 A. L. R. 2d 988-990; *Tampa Times Company v. Burnett*, DC Fla., 45 Fed. Supp. 166.)

In the light of the above mentioned authorities and the fact that Florida Statutes make no provision for the segregation of the intrastate business from the interstate business, the above question is answered in the negative under existing statutes and laws.

May 25, 1954.—054-124.

LICENSES—TIME REQUIREMENT—DELINQUENT PENALTIES—KOREAN VETERANS—EXEMPTIONS

QUESTIONS: 1. Where a person within the purview of either §205.16 or 205.161, F. S., or both such sections, fails to obtain the occupational license required of him within the time required by law, may he be charged with the delinquent penalties provided in §205.11, F. S.?

2. Are disabled veterans of the so-called Korean War entitled to the exemption provided by §§205.16 and 205.161, F. S., when otherwise within the purview of said statutes or either of them?

To: *Honorable C. M. Gay, State Comptroller:*

Although §§205.16 and 205.161, F. S., provide certain license tax exemptions or credits to disabled veterans of the Spanish-American War, World War I, and World War II, who are bona fide residents and electors of this State, we find nothing in said sections or either of them, or in any other statute of this state, exempting such disabled veterans from the obligations of §205.01, F. S., which provides that "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required" by the statutes and laws of this State. We find from a careful reading of said §§205.16 and 205.161, as well as §205.15, F. S., that they do not provide an exemption to the persons therein mentioned from obtaining an occupational license, but that they provide a credit to the persons therein named toward the obtaining of such a license, provided proper application is made for the required occupational license. These statutes are in the nature of credits upon the required license fee and not out and out tax exemptions. Under each of such statutes persons within their purview are required to make application for

the license, furnish proof of their right to the statutory credits or so-called tax exemptions, and comply with other requirements of the said statutes. Such persons are not permitted to engage in or manage any business, profession or occupation, for which a license is required, unless and until the required license is obtained, although the same may be obtainable without cost to the applicant by reason of the credits provided in said §§205.15, 205.16 and 205.161, F. S.

"Any person who shall carry on or conduct any business or profession for which a license is required, without first obtaining such license shall, except in such cases as are otherwise provided for by law, be guilty of a misdemeanor. . ." (§205.65, F. S.). Any person within the purview of either §§205.15, 205.16 or 205.161, F. S., who fails to make application for and obtain the occupational license required of him, would seem to be within the purview of this statute. Whenever any license tax required by the laws of this state "to be paid to the tax collector, shall remain unpaid after its due date for a period of ninety days, the tax shall be deemed delinquent and there shall be added thereto, and become a part of the tax, a penalty of ten per cent of the original amount of such license tax . . ." (Section 205.11, Florida Statutes). This is not a separate penalty, separate and distinct from the license tax, but is in the nature of an increased tax after the expiration of the said ninety day period, and would seem to be within the purview of §§205.15, 205.16 and 205.161, F. S.

It is noted that §§205.16 and 205.161, F. S., provide tax exemptions or credits to disabled veterans of the Spanish-American War, the World War I, and the World War II, and not to disabled war veterans generally. Such exemptions or credits are limited to disabled veterans of the armed services of the United States during said wars, and have no application to veterans of other nations in such wars. (See opinion of April 1, 1950; 050-169). Section 205.15, F. S., does not appear to be so limited. Provisions for exemptions from license taxes are to be strictly construed against the claimant and in favor of the public (*Harper v. England*, 124 Fla. 296, 168 So. 403).

In the light of the above and foregoing statutes, authorities and observations the above questions are answered as follows:

1. The first question is answered in the affirmative; however, the so-called penalty to be imposed is not separate from the license tax itself, but becomes a part thereof as an increased tax, so that the credits allowed under §§205.16 and 205.161, F. S., would be applicable thereto.

2. The second question is answered in the negative.

April 15, 1954.—054-86.

LICENSE TAXES—COIN-OPERATED ALARM CLOCKS— PUBLIC USE—§205.63, F. S. APPLICABLE

QUESTION: Where alarm clocks are placed in public places, including hotel and motel rooms, designed to alarm at a pre-ar-

ranged time by the insertion of a dime or other coin, are the owners of such clocks, or the clocks themselves, subject to occupational license taxes, and if so, under what section of the statutes?

To: Honorable C. M. Gay, State Comptroller:

We have examined Ch. 205, F. S., and find the following statutes to-wit, §§205.49 (businesses not otherwise classified), 205.53 (public service), 205.63, (coin operated devices), and 205.70 (coin operated radios), F. S., which have possible operation; however, we are inclined to the view that either §205.49 or §205.63 is the applicable statute. If §205.63 is applicable, then §205.49 would thereby be eliminated. Although §205.63 is entitled "vending machines" it provides in part that "every person who operates for profit any machine, contrivance or device which is set in motion or made or permitted to function by the insertion of a coin or slug, shall pay a license tax of five dollars for each machine, contrivance or device . . ." The alarm contrivance or device in the clock is set in motion or made or permitted to function by the insertion of a coin or slug at a pre-arranged time. Although vending machines are mentioned in the said section of the statute, it clearly embraces coin operated machines, contrivances and devices that vend nothing. Although the alarm clock in question vends no merchandise, it does, by reason of the insertion of the coin, vend noise calculated to be sufficient to awaken a sleeping person. An examination of prior statutes and their comparison with said §205.63 above mentioned seems to support this construction of said §205.63 (§17 (e), Ch. 14491, Acts of 1929; §§1083 and 1251, C. G. L. 1927).

The above question is answered by stating that the alarm clocks described therein are subject to license taxes under §205.63, F. S., under the facts set out in your request and your file furnished us.

April 28, 1954.—054-105.

LICENSE TAXES—REPRESENTATIVES AND OFFICES— PROMOTIONAL AND FRANCHISING DUTIES ONLY

QUESTION: Where a business concern maintains in this State an office from which personnel engaged in promotional duties only operate and locate and franchise new dealers and jobbers, should such business office and its personnel be required to obtain occupational licenses?

To: Honorable C. M. Gay, State Comptroller:

The personnel mentioned call upon wholesalers, jobbers, retailers, and occasionally upon the buying public, and promote the sale and use of one or more products manufactured or sold by the concern which they represent, and also in the selection and franchising of dealers and jobbers to handle their products. These personnel take no orders and sell no goods, wares or merchandise, but engage exclusively in promoting and advertising the products manufactured or sold by the concern which they represent.

Under Ch. 205, F. S., many types and kinds of businesses, professions and occupations are expressly required to obtain licenses and pay license taxes, and "every person engaged in the operation of any business of such nature that no license can be properly required of him under any other provision of this chapter, or any other law of the State of Florida . . ." is required to obtain a license under §205.49, F. S. "No person shall *engage in or manage any business*, profession or occupation, for which an occupational license tax is required . . . unless a state license, or a state and county license, or a county license, as the case may be, shall have been procured . . ." (§205.01, F. S.). These provisions require every person who operates a business of any kind or nature in this state to obtain a license and pay a license tax unless exempted by some statute, constitutional provision or law. Do the above stated facts constitute doing business in the State of Florida although no goods, wares or merchandise are sold or offered for sale through such business offices?

Whether or not certain facts and circumstances amount to doing business by a business establishment within a state depends largely upon the facts and circumstances in each particular case (51 Am. Jur. 749, Section 840). The mere maintenance of an office within a state by a business establishment does not establish the fact that it is doing business within the state, although such fact may be considered along with other facts in determining the question (51 Am. Jur. 749, §840, note 11). "Engaging in, or carrying on, a business means the employment which occupies the time, attention and labor of the person so engaged. It does not embrace acts performed preliminary and preparatory to engaging in business (53 C. J. S. 556, §27). The mere maintenance of an office in a state, or the mere advertisement and promotion of one's products, without efforts at making sales or the making of sales, is not within itself the doing of business; however, such facts, taken and considered in connection with other facts and circumstances may, and often does, evidence a doing of business in a state (see generally "doing business" in 13 Words and Phrases 126-231).

We do not think that the locating, obtaining, appointing and franchising of jobbers and dealers by a foreign corporation is within itself a "doing business" in this State, although it, together with other actions by such foreign corporation, might constitute "doing business"; in this connection each case must be determined from the applicable facts and circumstances. There must be something more than the mere franchising of jobbers and dealers. Neither do we think that advertising and promoting of a manufacturer's products in this State constitute doing business within this State, although these facts when taken into consideration with other facts and circumstances might constitute the doing of business within this State. Should a business concern maintain a staff in this State advertising and promoting its products, but making no sales thereof, and at the same time maintain another organization for the purposes of making sales within this State, the two organizations would be a part of the business organization operating in this State subjecting both to license taxation.

Sales in interstate commerce to dealers and jobbers in this State, even when connected with advertising and promotion of the product sold in this State, would not usually constitute doing business in this State, although facts and circumstances could, and sometime do, constitute doing business in this State. Whether or not certain facts and circumstances constitute doing business in this State is primarily a question of fact to be determined by the tax collector in the first instance and each case must be considered individually and determined from its particular facts.

The above observations answer the above question as well as it may be here answered.

November 4, 1953.—053-298.

GRAPHO ANALYST—HANDWRITING ANALYSIS— LICENSE TAXES

QUESTION: Is a person who, for a charge, examines samples of a person's handwriting and advises such person in person, or by indications on a chart, the person's traits revealed by such handwriting, and how the person whose handwriting has been analyzed may improve his, or her, charm, personality, etc., subject to the license tax imposed by §205.41, F. S.?

To: Honorable C. M. Gay, State Comptroller:

Every fortune teller, clairvoyant, palmist, astrologer, phrenologist, *character reader*, spirit medium, absent treatment healer, or mental healer, and every person engaged in any occupation of a similar nature shall pay a license tax of one hundred dollars; provided, that this section shall not be construed to require members of any recognized christian denomination who pray for the sick, to obtain a license. (§205.41, F. S.).

"Graphology (from the Greek grapho, 'to write,' and logos, 'a science'), which has been spelled sometimes Graphiology, or, as it has been written frequently, 'Graphomancy' (from the Greek grapho, 'to write,' and manteia, 'divination'), *is the science and art which deals with handwriting as an index to character, etc.; the divination, in fact, of mental and physical peculiarities by the inspection of a person's penmanship.*

Some writers have said that the subject is an art only; but that it can claim to rank as a science is proved, inasmuch as it is founded on elements and principles." (The Language of Handwriting by Richard Dimsdale Stocker, p. I). (Emphasis supplied.)

GRAPHOLOGY—The study of handwriting; esp., the art of judging of a person's *character*, disposition, and aptitudes from his handwriting, (Webster's International Dictionary, Second Edition). (Emphasis supplied.)

"The first known systematic attempts to study and describe the relationship between *handwriting traits* and *character traits* were made in Italy at the beginning of the seventeenth century, when Alderisius Prosper published in Bologna a study entitled

Ideographia. A physician, Camille Baldo, followed him with a treatise presenting a method for judging the nature of a writer from his letters. Both of these studies fell into oblivion. However, they must have attracted some contemporary readers, because subsequently it became a practice for itinerant magicians and other wonder workers to go from castle to castle giving consultations on character by means of handwriting interpretation.

In the eighteenth century, curiosity about the possible revelations to be found in handwriting began also to stir the minds of poets and philosophers. They were fascinated at discovering the intimate link between handwriting and character, and in studying scripts they came up with sharp observations and personality portraits of startling accuracy." (Handwriting by Klara G. Roman. p. 3). (Emphasis supplied.)

A study of these authorities and the definition of graphology clearly shows that a grapho analyst, is, in truth and fact, one who, among other things, reads character of individuals by an analysis of the particular individual's handwriting, and it is clear that the application of §205.41, F. S., is not limited to those professions which usually may be considered as synonymous with fortune telling.

In the light of the foregoing observations, it seems that a grapho analyst is, in truth and fact, among other things, a character reader within the purview of said §205.41, and that the question should therefore be answered in the affirmative.

September 24, 1954.—054-225.

PROFESSIONAL BONDSMEN—LICENSE TAXES

QUESTION: Are "professional bondsmen," as described in §903.111, F.S., subject to occupational license taxes under §205.53, F.S.?

To: Honorable C. M. Gay, State Comptroller:

Under said §205.53, F.S., "every person engaged in any business, as owner, agent or otherwise, that performs some service for the public in return for a consideration, shall for each place of business pay a license tax..." Note is also taken of §205.49, F.S., placing a license tax against miscellaneous businesses not otherwise classified; of §205.52, F.S., placing a license tax against persons engaged in the practice of a profession; and of §205.45, F.S., placing a license tax against insurance agents and solicitors.

Under §903.111, F.S., "no natural person may become a surety on a bail bond for money or other things of value, or act as agent for a surety company undertaking bail bonds for money or other things of value... unless such person shall be qualified and licensed" as required by said section. When so licensed such person "shall be a professional bondsman." It is clear from the above that the term "professional bondsman" extends to two types of persons; one an individual bondsman, and the other an agent for a corporate bondsman. "All professional bail bondsmen shall be qualified and licensed in the same manner as provided by law

under Ch. 627, F.S., pertaining to *limited surety agents*." §903.111, F.S.) We gather from these statutes that not only agents of corporations writing bail bonds, but also individuals who assume obligations as bail bondsmen, are required to be qualified and licensed in the manner provided by Ch. 627, F.S.

As used in Ch. 627, F.S., "a 'limited surety agent' is an individual appointed by a surety company, by power of attorney, to execute and/or countersign only bail bonds in connection with judicial proceedings." (§627.72, F.S.). The statutes seem to provide for the issuance of general (§627.79, F.S.) and limited (§627.82, F.S.) licenses to insurance and surety company agents and solicitors, "except as otherwise provided the provisions of this chapter (Ch. 627, F.S.) relating to agents generally, including fees and taxes, shall be applicable to individuals applying for or holding a limited agent's license." (Section 627.82, F.S.). The fees and taxes referred to in said Ch. 627, F.S., are regulatory licenses, fees and taxes and not occupational licenses and license taxes.

A person acting as agent for a surety company, although required to qualify as a professional bondsman under §903.111, F.S., is, nevertheless, an agent "authorized to solicit, negotiate, effect or write contracts of...surety...within this state, and subject to the license taxes provided in and by §205.45, F.S.," which are collected by the State Treasurer and distributed by him as provided in said section.

Section 205.43, F.S., makes reference to the definitions of an "insurer" in subsection (6) of §625.01, F.S., and adopts said definitions wherein an "insurer" is defined as "any person, firm, partnership, association, corporation or other organization or group who issue, or enter into, contracts or policies of insurance, indemnity or surety with another..." however, an individual issuing bail bonds is not specifically included in subsection (1) of said §205.43 which fixes the license fees for the businesses therein named. The business of furnishing bail bonds is doubtless a business for which an occupational license is required under Ch. 205, F.S., and unless it is subject to classification under some other section of the said chapter it falls within §205.49, thereof relating to businesses not otherwise classified by said chapter. We are informed that the State Comptroller's office by letter dated January 11, 1943, ruled that professional bail bondsmen were subject to the license taxes imposed by §205.53, F.S.; we find no ruling by this office or by any of the state courts on this question. We, therefore, shall treat the said letter as a departmental construction of long standing, which we are unable to say is clearly erroneous; and see no reason to upset in the absence of a court construction holding otherwise.

We, therefore, hold that "professional bondsmen" who are required to qualify under §903.111, F.S., who issue bonds for their own account and as their own obligation are subject to license taxes under §205.53, F.S.; but those persons who are qualified under said §903.111, who act as agents for surety companies are subject to license taxes under §205.45, F.S.

October 27, 1953.—053-294.

FLORIDA'S GAMECOCK FARMS—LICENSE FEES

QUESTION: May the so-called "Florida Gamecock Farms" be granted occupational licenses, and if so what is the proper license fee to be charged?

To: *Honorable C. M. Gay, State Comptroller:*

Application has been made by the "Florida Gamecock Farms" for occupational licenses in at least two counties in the State, with which application has been filed a blueprint of operation and arrangements. It is stated in the application that the said farms are to be operated as tourist attractions. The said applications in part provide that:

"The tourist attraction of this Farm, will be a tour and exhibition in the pit. This exhibition will compose of two equally matched gamecocks that are outfitted with miniature boxing gloves. They are released on parallel lines while facing each other. The parallel lines will be three feet apart. These cocks will be allowed to spar three short rounds of one minute duration each. There shall be a thirty second rest period between the rounds.

"The exhibition is to actual cock fighting, what wrestling is to prize fighting. In this exhibition, there will be no cruelty, determination of a winner, no gambling, or violation of the law in any manner whatever.

"A general admission will be charged and no alcoholic drinks will be allowed upon these premises. It will be understood that anything done at Florida's Game Farm will certainly be within the legal limits of the law."

Assuming these representations to be true it seems that such farms are not within the purview of any other section of Ch. 205, F. S., or any other licensing law, so that they fall within the purview of §205.49, F. S. Such a license is essentially an occupational tax for revenue only and is not intended for regulatory purposes. Questions of public morals, health and safety are not of paramount consideration as they are in the case of the issuance of a regulatory license. It follows that such an occupational license may be issued as a revenue tax under §205.49, however from the representations made in the application for license, we presume that there will be no cruelty to animals, no determination of a winner, no gambling, no alcoholic drinks and no other violations of the statutes of this state in connection with the licensed business; however, should there be any such violation the same will not be in any way authorized by the issuance of the license (§205.14, F. S., 53 C. J. S. 557, §28). The obtaining of a license and the payment of a license tax "is no justification for doing a forbidden act." Should the licensee in any way violate the criminal statutes of this State the fact that he holds a license under §205.49, F. S., will in no way, constitute a defense to a criminal charge based on such violation.

October 21, 1953.—053-283.

STATE INSTITUTIONS—BUSINESSES AND EQUIPMENT ON
CAMPUS GROUNDS—LICENSE TAX LIABILITY—
EXEMPTIONS

QUESTION: Are items of equipment (Coca Cola and other vending machines, hair dryers, laundry and similar machines, etc.) and businesses (barber shops, beauty parlors, watch repair shops, etc.) located on grounds of state institutions, especially the campuses of state colleges and universities, subject to license and license tax requirements of our statutes?

To: *Honorable C. M. Gay, State Comptroller:*

Although the request seems to directly refer to equipment and businesses located on the campus of the University of Florida in Alachua county, Florida, doubtless the same situation and condition exists on the campuses of other state universities and institutions; therefore, the question is stated generally and is not limited to the campus of the University of Florida.

Any such equipment and businesses owned and operated by the state, either directly or by or through one or more of its agencies, boards or commissions, would be exempt from license and license taxes, unless otherwise provided by the statute law of this state. We know of no statute expressly providing for the licensing or requiring license taxes of such businesses and equipment owned or operated by the state. There are certain license and license tax exemptions granted by §§205.15, 205.16, 205.161, 205.17, 205.18 and 205.19, Florida Statutes, whether any of these apply to particular business or profession is to be determined from the facts and circumstances in each particular case.

No person, unless exempt by law, "shall engage in or manage any business, profession or occupation, for which an occupational license tax is required" unless and until he shall have procured such a license. We know of no statute or law of this state which exempts persons who "engage in or manage any business, profession or occupation" upon state property from the payment of a license tax when otherwise required by law. The fact that a person may be operating a business, profession or occupation on state property, under a lease or other arrangement from the state, does not by such fact alone exempt him from the payment of a license tax.

The fact that a business may be operated in competition with local private enterprises does not require that it be taxed, if it is otherwise entitled to exemption under the statutes. Coca Cola and other vending machines, hair dryers, laundries and similar machines, etc., if privately owned and within the purview of our license and license tax statutes, would not be exempt merely because located upon state property. Likewise barber shops, beauty parlors, watch repair shops, etc., if privately owned and operated and within the purview of our license and license tax statutes, would not be exempt merely because located upon state property.

Although equipment and housing facilities may be owned by

the state for operation in connection with the state institution where located, if the same is leased or otherwise let to private persons, firms or corporations for operation as a private business such business would not be exempt from license and license tax requirements. Equipment owned and maintained by the state or its institution for the use and benefit of the students at the institution, to be operated by the student at a price, such as hair dryers, laundry equipment, etc., would not constitute the operation of a business, profession or occupation by such students and the same would appear to be exempt as state equipment.

We doubt that the above question is subject to a positive answer, but must be answered as to each individual case by the application of the rules and observations herein set out, together with other applicable statutes, rules, regulations, etc.

August 31, 1953.—053-220.

LICENSES—PHYSICAL THERAPISTS—QUALIFICATIONS

QUESTIONS: 1. Is the practice of physical therapy a profession?

2. If so, in view of Chapter 24352, Acts of 1947, (§205.051, F. S., 1951) is it a part or a branch of the medical profession?

3. If the answer to the above questions is in the affirmative, is the tax collector of Dade County, Florida, required to see an applicant's certificate or license of competency from the State Board of Medical Examiners of Florida before he can issue a state and county occupational license to the applicant?

To: *Honorable Lewis H. Tribble, General Counsel, Comptroller's Office, Tallahassee:*

Section 205.01, F. S., provides that no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state, unless a state license, or a state and county license, or county license, as the case may be, shall have been procured.

Section 205.051, F. S., provides:

"205.051 Issuance of license to practice medicine.—

"(1) From and after the passage of this act it shall be unlawful for the tax collectors of the several counties of the State of Florida to issue state and county occupational licenses to any person applying for license to practice medicine in any of its branches unless and until proof of current qualification and competency, as established by certificate or license issued by state boards duly constituted and legally authorized to determine qualification and competency, be exhibited at the time of making such application.

"(2) That nothing herein shall be construed to repeal any license tax now imposed by law and not specifically repealed hereby."

Chapter 486, F. S., provides for examination and registration of physical therapists by the Board of Medical Examiners. Section 486.10 provides that it shall be unlawful for any person who is not registered under this chapter as a physical therapist, or whose registration has been suspended or revoked, to use in connection with his name the words or letters "Registered Physical Therapist," "R. P. T.," or any other letters, words, or insignia indicating or implying that he is a registered physical therapist, or who in any other way, orally or in writing or in print or by sign, directly or by implication, represents himself as a registered physical therapist.

In view of the foregoing, it is my opinion that questions one, two and three should be answered in the affirmative, and the tax collector should refuse to issue to the applicant an occupational license to practice physical therapy until such time as the applicant shall establish current proof of qualifications by furnishing a certificate of registration issued by the Florida State Board of Medical Examiners.

March 9, 1953.—053-54.

**LICENSE TAX EXEMPTIONS—DISABLED WAR VETERANS
—AUTOMOBILES FOR HIRE**

QUESTION: May a County Tax Collector issue a tax exempt occupational license under §205.16, F. S., to a qualified disabled war veteran for the operation of more than one automobile for hire?

To: Honorable C. M. Gay, State Comptroller:

Florida residents who qualify as disabled war veterans have been given an exemption, not to exceed fifty dollars, from state, county or municipal license taxes and shall be granted a license, subject to certain specified limitations, to engage in any business or occupation in the State of Florida which may be carried on mainly through the personal efforts of the licensee as a means of livelihood. (§205.16, F. S.) The statute giving the exemption expressly provides that the exemption "shall extend to and include the right of licensee to operate *an automobile for hire of not exceeding five passenger capacity*, including the driver, . . . and is being operated by him as a means of livelihood . . ." (Emphasis supplied)

When a statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is to be construed strictly against the one who asserts the claim of exemption. (51 Am. Jur. Taxation, Section 524, *Steuart v. State*, 119 Fla. 117, 161 So. 378; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232.) Our veterans' exemption statute speaks of "a license" and the right to operate "an automobile for hire not exceeding *five-passenger capacity*, including the driver." (Emphasis supplied) The singular is used in each instance.

From the above and foregoing observations and authorities, we are of the opinion that the question should be answered in the negative.

December 28, 1953.—053-338.

**REAL ESTATE COMMISSION—BROKER AND SALESMEN—
COUNTY LICENSES—MANATEE AND SARASOTA
COUNTIES—CH. 205, F. S.**

QUESTION: May a county occupational license be issued, under §205.52, F. S., to persons who qualified with Real Estate Commission prior to the effective date of Ch. 28482, Laws of Florida, Acts of 1953, when such person is within the apparent purview of the said enactment?

To: Honorable C. M. Gay, State Comptroller:

The legal effect for Ch. 28482, Laws of Florida, Acts of 1953, at the time of its enactment and at the present time, is to provide that "no county license to engage in the occupation of real estate broker or real estate salesman shall be issued in" Manatee and Sarasota counties, Florida, "to any person who has not been a resident of Florida for one year . . ." There are certain other limitations imposed by said enactment as to experience. Although there appears to be a material question as to the constitutionality of the above enactment under §§20 and 21, Art. III, of the State Consti., it has never been the policy of this office to pass upon questions relating to the constitutionality of enactments in connection with its opinions, such questions being left up to the courts. We shall, therefore, for the purposes of this opinion, presume the validity of the said enactment.

It is noted that the enactment provides that "no county license to engage in the occupation of real estate broker or real estate salesman shall be issued in" said counties "to any person who has not been a resident of Florida for one year . . ." This limitation is clearly applicable to county occupational licenses under Ch. 205, F. S., and has no reference to, and is not dependent on, regulatory licenses issued by the Real Estate Commission. The enactment does not seem to be dependent upon the broker or salesman holding a regulatory license from the Real Estate Commission.

These observations seem to answer the above question in the negative.

TAXES ON GASOLINE AND LIKE PRODUCTS

February 3, 1954.—054-25.

**JUNGLE GARDENS—GASOLINE USED FOR BULB FARMING
—EXEMPTIONS**

QUESTIONS: 1. Please advise if McKee Jungle Gardens, and similar business ventures, are entitled to gasoline tax refunds (under §§208.47 to 208.63, F. S.) for gasoline consumed in operating its nursery department and replanting therefrom in the gardens area?

2. Are persons engaged in growing bulbs for commercial use or sale entitled to the said exemption?

To: Honorable C. M. Gay, State Comptroller:

The McKee Jungle Gardens consist of about 118 acres of gardens. As a part of the gardens there is operated an extensive nursery department where many types of plants, shrubs and trees are propagated. After propagation such nursery stock is taken up and replanted throughout the main gardens, which it is claimed is used for public viewing and educational attraction. It is claimed that the garden has collected more than 2,000 species of plants, shrubs and trees from many countries and six continents. Gasoline is used by the gardens to plow and cultivate the nursery and gardens, clear lands, transport plants and trees and in fertilizing and cultivating growing plants throughout the gardens. It is claimed that the tractors and cultivating equipment using gasoline are never driven or operated upon public roads, streets or highways.

The statutes grant certain exemptions from gasoline taxes as to gasoline used for *agricultural purposes*, which purposes are defined as gasoline used "in operating tractors and other farm equipment used exclusively in plowing, planting, harvesting, or processing farm products on the farm . . .," where no part of such gasoline is used "upon public roads, streets or highways of this state." (§208.47, F. S.). Turpentine farming has been declared by statute in this state to be the production of agricultural products (§1.01(11), F.S.)

The production of gladiolus and gladiolus bulbs (Florida Gladiolus Growers Association v. U. S. DC Fla., 106 Fed. Supp. 525) Tobacco (I. C. C. v. Yeary Transfer Company, DC Ky., 104 Fed. Supp. 245), peanuts (Fleming v. Farm Peanut Company, DC. Ga., 37 Fed. Supp. 628), fruits (3 Words and Phrases 64 et seq.), pine tree gum (U. S. v. Turner Turpentine Company, CCA 5th., 111 F. 2d. 400), flowers and plants in greenhouses (Gwin v. J. W. Vestal & Son, 205 Ark. 742, 170 S. W. 2d 598; Henry A. Dreer, Inc., v. Unemployment Compensation Commission, 127 N. J. L. 149, 21 A. 2d. 690), sugar cane farming (Vives v. Serralles, CCA Puerto Rico, 145 Fed. 2d 552), and Nurseries (Hill v. Georgia Casualty Company, Tex., 45 S. W. 2d 566) have been held to be agricultural in their nature. The products of nurseries and greenhouses have been held to be "agricultural products" (State v. Wertheimer, 253 Ala. 124, 43 So. 2d. 824). "Agricultural products" in its broad sense includes farm, horticultural and forestry products (Northern Cedar Company v. French, 131 Wash. 394, 230 P. 837; Forsythe v. Village of Cooksville, 356 Ill. 289, 190 N. E. 421). See also definition of "farm product" in 35 C. J. S. 750. There seems to be a conflict of authority of whether the growing of bulbs, flowers, and greenhouse plants commercially is farming, the line of demarcation being uncertain in some cases.

In the light of the above authorities we are inclined to think that the actual growing and cultivating nursery plants, bulbs and the like for replanting constitutes agricultural purposes. We doubt that the replanting of such plants, bulbs, and the like will constitute farming or agricultural purposes unless the product of such replanting will itself constitute farming or agricultural operations.

The replanting of citrus trees, tobacco plants, potato plants, and similar, being part of a farming or agricultural operation, would seem to be an agricultural purpose. Whether the replanting of plants, bulbs, and the like is part of a farming operation must be determined from the facts in each separate case.

These observations seem to answer the above questions as well as they may be generally answered.

August 31, 1953.—053-217.

MOTOR FUEL TAX—METHOD OF MAKING REFUNDS

QUESTION: What period or periods of time are embraced within that portion of subsection (1), §2, Ch. 28098, Laws of Florida, Acts of 1953, providing that "no refund shall be authorized unless the amount due is for five dollars or more within any three months period"?

To: Honorable C. M. Gay, State Comptroller:

Although claims for refunds are payable every six months beginning on January 1, 1954, (Subsection (2), §2, Ch. 28098, Laws of Florida, Acts of 1953, applications for refunds must be made within six months from the date of the purchase (Subsection (1) of said §2, Ch. 28098). Under the same subsection of the said statute refunds may not be made on purchases of less than twenty-five gallons at any one time and no refunds may be made unless the refund amounts to five dollars in any three months period. At the present time only four cents of the seven cent state tax on gasoline may be refunded under said chapter; therefore, purchases totaling 125 gallons or more must be made within a three months period to entitle the purchaser to a refund. The phrase "any three months period" clearly contemplates a period of three consecutive months.

Suppose a return of purchases beginning on January first of any year is made showing that the total purchases in January were thirty gallons, in February forty gallons, in March forty-five gallons, in April forty-five gallons, in May thirty gallons and in June thirty gallons; the only three consecutive months in this period in which 125 gallons or more were purchased were February, March and April, so that purchases made in such period of time may be refunded. No other consecutive three months period shows the required 125 gallons in purchases. Had the purchases been thirty, forty, forty-five, thirty, forty-five and thirty, no consecutive three of said six months purchases would have the required total so that no refund might be made. Had the purchases been one hundred twenty-five, none, none, forty-five, forty-five and thirty-five, the purchases for the first three or for the last three months would comply with the statute but no other three consecutive months would. It would seem that the three consecutive months may be any three months, so long as they are consecutive, provided that no purchase of less than twenty-five gallons at one time may be used in making such calculation.

The above observations seem to be sufficient to provide a formula for answering the above question under most any existing circumstance.

August 24, 1953.—053-214.

TAXES PAID ON GASOLINE USED FOR AGRICULTURAL PURPOSES—REFUND

QUESTION: Under §2, Ch. 28098, Laws of Florida, Acts of 1953, "any person who shall use any motor fuel for agricultural purposes . . . , on which the tax, as imposed by Ch. 208, F. S., has been paid shall be entitled to a refund of the state tax, except" the second gasoline tax and the seventh cent tax. Which of the following uses are for "agricultural purposes" and within the purview of said Ch. 28098, to-wit:

1. Unlicensed trucks used as service trucks to refuel farm tractors.
2. Unlicensed trucks used as service trucks to transport laborers on or about the farm.
3. Unlicensed trucks used for transportation of tools and implements on the farm.
4. Unlicensed trucks used in transporting farm products from the field to the farm storage on the farm.
5. Unlicensed passenger vehicles for field inspection service on the farm.
6. Caterpillars used for clearing farm land.
7. Caterpillars used for loading farm products.
8. Caterpillars used for ditching and grading farm land.
9. Bulldozers used for clearing farm land.
10. Power saws used for clearing farm land.
11. Power saws used for cutting fence posts and fire wood for farm use.
12. Draglines used for farm ditch digging.
13. Draglines used for loading of farm products.
14. Grader used for grading farm land.
15. Portable welders used for repairing farm machinery.
16. Gasoline used for cleaning and washing farm motors.
17. Concrete mixers used for mixing concrete on the farm.
18. Air compressors used for inflating tires on farm machinery.
19. Stationary engines used for irrigation purposes.
20. Fog applicators for spraying livestock.
21. Stationary engine used for grinding feed.
22. Stationary engine used for drying hay and seed in drying barn.
23. Truck licensed with Series "P" license tag used for transporting farm products and farm laborers.
24. Truck licensed with Series "P" license tag on which a permanent sprayer is mounted used for spraying purposes.
25. Truck licensed with Series "P" license tag on which a permanent fertilizer distributing body is mounted used for distributing fertilizer.
26. Vegetable washers?

To: Honorable C. M. Gay, State Comptroller:

For one to be entitled to a refund, under Ch. 28098, Laws of Florida, Acts of 1953, of motor fuel taxes paid the motor fuel,

upon which the taxes were paid, must have been (1) "used in operating tractors or other farm equipment," (2) "Used exclusively in plowing, planting, harvesting or processing farm products," (3) "on the farm," and no part of the said motor fuel may be used "in any vehicle or equipment driven or operated upon the public roads, streets, or highways of this state." (Subsection (6), §1, Ch. 28096, Laws of Florida, Acts of 1953). In the light of the holding of the Supreme Court in *Hart v. Stinson*, 135 Fla. 331, 185 So. 139, we do not think that the use of a road, street or highway by a tractor or other farm equipment merely and only as a means of passage between fields, groves or orchards for the purpose of plowing, planting, harvesting and processing farm products on the farm, would in any way violate the exclusiveness of the agricultural operations. "Processing farm products," as used in the statute, seems to contemplate a series of acts, events and occurrences to transfer farm products into usable products either by cleaning, cooking, mixing, canning, or other acts necessary to transform the farm product into a usable or commercial product. Such processing may have the effect of transforming or converting farm products into different states or forms than originally. Such process may convert a raw material into a marketable product. (34 Words and Phrases, under "Processing.") To be entitled to the exemption the "tractors or other farm equipment" must be used in plowing, planting, harvesting or processing farm products," (Subsection (6), §1, Ch. 28098, Acts 1953), it is clear from this quotation that there are probably other farm operations not within the statute; if the operation is neither "plowing, planting, harvesting or processing farm products," it is not within the statute and no refund may be made.

The verb "plow", when used in connection with farming operations, is defined by Webster as "to turn up, break up, or trench with a plow; to till with or as with a plow; to make, as a furrow, with a plow; as, to plow a field." "A plow" has been defined as an "agricultural implement drawn by animals or moved by steam power, used to cut the ground and turn it up so as to prepare it for the reception of seed, or to prepare it for sowing or planting." (49 C.J. 1035). "As a verb, to break up or turn up the surface of the land with a plow." (49 C.J. 1035). We think the statutory definition also contemplates any plowing involved in the cultivation of agricultural products in addition to breaking of land. Chapter 28098, Laws of Florida, Acts of 1953, clearly contemplates that the "plowing" mentioned therein be in connection with some agricultural purpose.

The terms "planting" and "harvesting", as used in the statute, are terms of common and rather definite meaning in connection with farming operations. Considerable work and methods of operation may be involved with some planting operations, and numerous kinds and types of machinery and equipment may also be involved. While the planting of corn may be rather simple, the setting out of tomato, sweet potato, tobacco and other types of plants may be contemplated, and may include watering at the time of planting. In the case of harvesting, the harvesting of some products is rather simple while other harvestings are complicated and require complicated machinery. Under the statute for one to be entitled to a refund

of taxes paid on gasoline used in tractors and farm equipment, such tractors and farm equipment must be used exclusively "in plowing, planting, harvesting or processing farm products."

The question here presented is which of the things, acts, uses and processes mentioned in the above stated question are included within the phrase "plowing, planting, harvesting or processing of farm products on the farm."

1. Where unlicensed trucks are used *exclusively* as service trucks to refuel farm tractors or other farm equipment used exclusively in plowing, planting, harvesting or processing farm products on the farm, or for such purpose and for plowing, planting, harvesting or processing farm products on the farm, the exemption may be allowed. If put to any other use the exemption should be disallowed.

2. Where unlicensed trucks are used as service trucks to transport laborers on or about the farm the exemption may be allowed if such laborers are engaged exclusively in "plowing, planting, harvesting or processing farm products on the farm," and the said truck is used for no other purpose not to be classified as "plowing, planting, harvesting or processing farm products on the farm."

3. A rule similar to the answer given question two (2) is applicable as to unlicensed trucks used to transport tools and implements on the farm.

4. A rule similar to the answer given question two (2) is applicable as to unlicensed trucks used to transport farm products from the field to field storage on the farm.

5. An unlicensed passenger vehicle used exclusively in connection with the supervision and inspection of crews and equipment engaged exclusively in "plowing, planting, harvesting or processing farm products on the farm," would seem to be within the statute and entitled to a refund, if used for no other purpose than that embraced within the term "plowing, planting, harvesting or processing farm products on the farm." If used for any other purpose no refund should be allowed.

6. Caterpillar tractors used for removing trees, brush, stones, and other growth and material from lands, would not be within the statute unless such use can logically be said to be an essential part of the process of plowing, planting, harvesting or processing farm products. Examples: Removal of stumps and stones as a part of the work of plowing and planting; pushing away brush ahead of tractor plows.

7. Caterpillars used for loading farm products, where such loading is in connection with "plowing, planting, harvesting or processing farm products on the farm" is within the statute; but if used for other purposes no refund should be allowed.

8. Caterpillars used for general ditching and grading of farm lands are usually not within the statute; however, where a minor amount of ditching or grading is done in connection with the direct

preparation of the lands for seeding or planting and as an incident thereto such work may be included.

9. The rule announced under paragraph numbered "6" above as being applicable to caterpillars would seem to be applicable to bulldozers used for like or similar purposes.

10. Power saws used for clearing farm lands are not within the statute.

11. Power saws used for cutting fence posts and fire wood for farm use are not within the statute.

12. Draglines used for general farm ditching, especially where the ditch is a permanent improvement, are not within the statute; however, it might be possible to so use a dragline as to constitute plowing if lands are broken up and prepared directly for immediate planting operations.

13. Draglines used for loading of farm products, where such loading is in connection with "plowing, planting, harvesting or processing farm products on the farm" are within the statute; but if used for other purposes no refund should be allowed.

14. The rule announced under paragraph numbered "6" above as being applicable to caterpillars would seem to be applicable to graders used for like or similar purposes.

15. Where a portable welder is used exclusively for repairing tractors or other farm equipment engaged exclusively in "plowing, planting, harvesting or processing farm products on the farm" would seem to be within the statute; however, if used for any other purpose it would not be.

16. Gasoline used for cleaning and washing farm motors used in operating tractors or other farm equipment used exclusively in "plowing, planting, harvesting or processing farm products on the farm" would seem to be entitled to exemption; otherwise, not.

17. Concrete mixers used for mixing concrete on the farm would not usually be within the act.

• 18. Air compressors used exclusively for inflating tires on farm machinery, if "tractors or other farm equipment" used exclusively in "plowing, planting, harvesting or processing farm products on the farm" would appear to be within the statute; otherwise not.

• 19. Stationary engines used for general irrigation purposes would not appear to be used in "plowing, planting, harvesting or processing farm products on the farm" and are, therefore, not within the statute. Portable engines used exclusively for pumping water on growing crops when water is needed and pumping water off of growing crops where there is an excess of water would appear to be used in "plowing, planting, harvesting or processing farm products on the farm" and are, therefore, within the statute.

20. Fog applicators for spraying live stock would not appear to be within the statute.

21. Stationary engines used for grinding feed would not appear to be within the statute unless such grinding amounted to the processing of farm products on the farm, then they are.

22. Stationary engines used for drying hay and seed in drying barns if used exclusively for that purpose would appear to be used in connection with the processing of farm products on the farm and would, therefore, be within the statute and entitled to exemption.

23. Trucks licensed with Series "P" license tags used for transporting farm products and farm laborers in connection with "plowing, planting, harvesting or processing of farm products on the farm" would appear to be within the statutes, but if used for other purposes would not be within the statute.

24. Trucks licensed with Series "P" license tags on which a permanent sprayer is mounted used for spraying farm products produced by "plowing, planting, harvesting or processing of farm products on the farm" would appear to be within the statute and entitled to refund; but if used for any other purpose would not be within the statute and would not be entitled to refund.

25. Trucks licensed with Series "P" license tags on which a permanent fertilizer distributing body is mounted and used exclusively for distributing fertilizer in connection with "plowing, planting, harvesting or processing of farm products on the farm" would appear to be within the statute and entitled to refund; but if used for any other purpose no refund should be allowed.

26. Vegetable washers used in connection with the harvesting or processing of farm products on the farm would appear to be within the statute but if used for any other purpose no refund should be allowed.

November 9, 1953.—053-303.

MUNICIPALITIES—HEALTH HAZARD—USE OF CIGARETTE TAX FUND—CITY OF HOLLYWOOD

QUESTION: May the City of Hollywood borrow from its cigarette tax fund (funds received by the said city pursuant to §210.03, F. S.) and use said funds for the purpose of filling in unimproved property within the city limit of said city to eliminate a health hazard to the residents of said city, and repay such funds borrowed from the said cigarette tax fund from proceeds of special assessments as soon as such special assessments are collected?

To: *Honorable Judson A. Samuels, City Attorney, Hollywood, Florida.*

Section 210.03, F. S., provides that municipalities in this state may impose an excise or privilege tax upon the sale, receipt, purchase, etc., of cigarettes sold within the territorial limits of such municipality. Subsection 5 of this section provides, in part, as follows:

"Any funds received under and by virtue of this chapter by municipalities shall be used and expended for the following purposes only: . . .

"for the future cost, purchase, building, designing, engineering, planning, repairing, reconditioning, altering, expanding, maintaining, servicing and otherwise operating any of the following:

"streets, bridges, storm sewers, curbs, drains, gutters, water supplies, sanitary facilities and services for the preservation, protection or improvement of the public health and safety, including hospitals, fire stations and fire fighting equipment, sanitary sewers, sewerage disposal systems, sewerage disposal plants and facilities, garbage and refuse collection and disposal services, facilities and equipment, incinerators and other facilities and services, including street cleaning, inspections and services for the protection of public health including the enforcement of ordinances designed to maintain safe health standards with respect to foods, mosquito, insect and rodent eradication and control, and *the removal and abatement of nuisances which may be or constitute dangers to public health and the exercise of controls for public safety*, facilities for the prevention of beach erosion, the enforcement of the laws of the State of Florida, and municipal ordinances with respect to public travel, health and safety, and such other state functions which are performed by municipal governments within their boundaries, and are otherwise performed by the state and county governments outside of the limits of incorporated municipalities." (Emphasis supplied.)

And paragraph (e) of the first subsection of §210.21, F. S., as amended by said Act, which paragraph reads as follows:

"As an alternative to the provisions and requirements of the foregoing sub-paragraphs a-d, inclusive, fifty (50) per cent of the additional cigarette tax revenue received by any municipality during any twelve month period subsequent to November 1, 1949, under the provisions of this chapter over any cigarette tax revenue which it received during the twelve months ending November 1, 1949, or so much thereof as shall be necessary for the purpose, shall be placed in the sinking fund of the municipality to reduce the ad valorem debt service millage or appropriation required to provide the annual debt service requirements of said municipality for its general obligation bonds issued for the functions and purposes set forth in sub-paragraph (5) of §210.03 of this chapter, and the balance of said revenue shall be used for the said purposes set forth in said paragraph of said sub-section."

Under the provisions of §210.21, F. S., as amended by the 1949 act, it seems that municipalities receiving cigarette tax funds pursuant to Ch. 210, F. S., as amended, shall either reduce the operating ad valorem taxes of the municipality in the amount provided by said section or apply fifty per cent of the said cigarette tax to the payment of the municipality's "general obligation bonds issued for the functions and purposes set forth in subsection (5) of §210.03," F. S., above quoted.

In view of the fact that funds derived from cigarette taxes may be used for "the removal and abatement of nuisances which may be or constitute dangers to public health, and the exercise of controls for public safety," it seems to us that such funds may be used to fill in unimproved property for sanitary reasons, if such property, as it exists, presents a health hazard to the residents of the City of Hollywood.

We think that said cigarette tax funds may be borrowed and placed in a special assessment fund for the purpose of presently financing the filling in of the unimproved property, and that the disbursements from any such special assessment fund may be repaid from proceeds of special assessments. However, it seems that any such funds repaid to the special assessment fund would have to be used for the purposes set forth in §210.03(5), F. S.

We think that your question should, subject to the foregoing observations, be answered in the affirmative.

TAX ON SALES, USE AND CERTAIN TRANSACTIONS

November 18, 1954.—054-250.

HOTEL AND RESTAURANT COMMISSIONER—LICENSES— SUSPENSION—SALES TAX LAW VIOLATIONS—CH. 212, F.S.

QUESTION: Does the Hotel and Restaurant Commissioner have the authority to suspend the license of a hotel, motor court, or apartment house on the grounds that the owner has violated the provisions of Ch. 212, F.S., by failing to file a certificate of registration with the Comptroller and by failing to pay the sales tax required by that chapter?

To: Honorable Joe H. Adams, Hotel and Restaurant Commissioner:

A letter from the Miami office of the State Comptroller, requesting the action indicated by the question, is returned herewith.

Chapter 212, F.S. is the Florida Revenue Act of 1949, and is more commonly known as the sales tax law. By its provision a tax is required to be paid in connection with the transient or temporary occupancy by paying guests of hotels, motor courts, and apartment houses. (See §212.03, F.S.) It is apparent that the primary enforcement authority with respect to the sales tax law is vested in the Comptroller (See §§212.14 and 212.18); that the Hotel and Restaurant Commissioner must cooperate with the Comptroller to the extent of providing required information (See §212.19); and that the Hotel and Restaurant Commissioner shall not issue a license to any business within his jurisdiction until such business has obtained and has on file with the Comptroller the certificate of registration contemplated by §212.18. It is also apparent that the Hotel and Restaurant Commissioner has the authority to revoke or suspend hotel and restaurant licenses only for violations of Ch. 511, F.S., and for violations of the regulations promulgated thereunder. (See §511.05, F.S.)

It might be argued that the Hotel Commissioner has the au-

thority to suspend the license of an operator for failure to pay the sales tax since he has the authority, and is required, to refuse to issue a license to one who does not have the certificate of registration required by the sales tax law. But the fact that the Commissioner must refuse to issue a license under certain circumstances does not necessarily mean that under the same circumstances he may suspend a license already issued. It is evident that the Legislature intended for the Comptroller to be the one primarily responsible for the enforcement of the sales tax and granted him ample power for that purpose. If the Legislature had intended that the Hotel and Restaurant Commissioner exercise the enforcement of the sales tax on temporary rentals, it could have specifically granted him such power and need not have given the Comptroller the detailed enforcement powers set out in §212.14.

In view of the foregoing considerations it is my opinion that the Hotel and Restaurant Commissioner's duty with respect to the enforcement of the sales tax is largely a passive one involving the providing of information required by the Comptroller, and the refusal to issue a license to a business under his jurisdiction until such business has obtained a certificate of registration from the Comptroller; and that the Commissioner has no authority to revoke or suspend a hotel license because of the licensee's failure to comply with Chapter 212, Florida Statutes. Your question is therefore answered in the negative.

May 14, 1954.—054-117.

SALES AND USE TAXES—SALES OF TANGIBLE
PERSONAL PROPERTY ON FISHING AND
COMMERCIAL BOATS—WATERS—
TERRITORIAL LIMITS

QUESTION: Where fishing and other commercial watercraft operating from Florida ports into international waters make sales of tangible personal property within the purview of Ch. 212, F. S., while in such waters, are such sales subject to taxation under said Ch. 212?

To: *Honorable C. M. Gay, State Comptroller:*

The situs or location of a sale or use must be within the taxing district or territory in order for such sale or use to be taxable under a sales or use taxing statute. Sales which take place outside the State or taxing district are not subject to sales taxes, but sales which take place therein are subject to such taxes. Use taxes are on property used or consumed within the State or taxing district. (53 C. J. S. 554 and 555, Section 26).

"Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong. So far as transactions had or acts done on board are concerned, such vessels are deemed to be within the country of their owners. Constructively, they constitute a part of the territory of the nation whose flag they fly. With respect to private matters, however, the view has been taken that the laws of the owner's residence, not those of the place of registration, follow a ship on the high seas."

(30 Am. Jur. 197, Section 37). "The term 'territorial' as descriptive of national domain, includes not only the land surface within the state's boundaries, but also . . . for some purposes, vessels belonging to the State and its nationals . . ." (48 C. J. S. 11, Section 7).

The Court of Appeals of New York in the case of *Fisher v. Fisher*, 250 N. Y. 313, 165 N.E. 460, 61 A.L.R. 1523, text 1526-7, discussing this question said:

"A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries. Whart. Conf. L. §356. Wharton says: 'As between the several states in the American Union, a ship at sea is presumed to belong to the state in which it is registered.' For this statement the sole authority is *Crapo v. Kelly*, 16 Wall. 610, L. ed. 430. We think that the learned author misconceived the decision in that case. The ship there considered was a vessel owned by residents of the state of Massachusetts. It was, likewise, registered at a port within the state of Massachusetts. As we read the case, the court decided that the vessel was a Massachusetts ship, not because it had a Massachusetts registry, but because its owners were citizens of Massachusetts. The court said: 'Again, the owners of this vessel and the assignees in insolvency were citizens of Massachusetts, and subject to her laws. It is not doubted that a sale of property between them of property on board of this vessel, or of the vessel itself, would be regulated by the laws of Massachusetts.' In *The Havana*, 12 C. C. A. 361, 26 U. S. App. 231, 64 Fed. 496, it was held that a vessel owned by a New Jersey corporation, although registered in New York, was a New Jersey vessel. In *International Nav. Co. v. Lindstrom*, 60 C. C. A. 649, 123 Fed. 475, it was said: 'It is plain that the New York statute did not reach the case, because, inasmuch as the steamship belonged to a citizen of New Jersey, it was a vessel of that state, notwithstanding its registry in New York.' To the same effect are *United States Shipping Bd. Emergency Fleet Corp. v. Greenwald* (C. C. A. 2d) 16 F. (2d) 948, and *The Hamilton* (Old Dominion S. S. Co. v. *Gilmore*) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133. In *Southern P. Co. v. Kentucky*, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13, it was held that a vessel belonging to a Kentucky corporation was taxable in Kentucky although it was enrolled in the port of New York, had the name of New York painted on its stern, and never had been at any port in Kentucky. We think it clear, under the authorities, that the laws which follow a ship upon the high seas are the laws of the state where the owner resides, not the laws of the state within which the ship is registered."

Steamships have their situs for taxation in the states where their owners are domiciled, and not the states of registration, although such ships may have never been in the state of their tax situs and may be incapable of going there. See *Southern Pacific Company v. Commonwealth of Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96, where the Southern Pacific Company was incorporated

under the laws of Kentucky where it maintained general offices but was the owner of several ocean going steamships running between the City of New York and the Pacific Coast and between points on the Atlantic and Pacific Coasts, with said ships being registered as having their home port in New York. None of these ships had ever been within the State of Kentucky; however, by reason of the residence of their owners being in Kentucky they were held subject to taxation in Kentucky. There were many like cases cited in the *Southern Pacific* case. Tangible personal property having no actual situs within a state is subject to taxation at the residence of its owner (51 Am. Jur. 466, §451), and this being true it would seem that tangible personal property on a seagoing vessel would be subject to taxation at the residence of its owner. The validity of a marriage upon a vessel at sea is determined by the laws of the state of the vessel's situs (*Fisher v. Fisher*, supra.)

We cannot conceive of a vessel without what may be said to be its home port; it is either registered as being located at some port, or if not registered its owner resides in some state or country, thus giving the vessel, under international law, the situs of some state or country so that sales and transactions thereon are in contemplation of law made within the territorial limits of such state or country.

The above question is answered in the affirmative where such vessels have their legal situs in Florida.

Taxes imposed upon the sale of tangible personal property on a boat or vessel plying in navigable waters are not tonnage taxes within the purview of Art. I, §10, Clause 3, of the Federal Constitution, in that such taxes are not measured by the capacity of the boat or vessel, nor are they imposed upon the right or privilege of entering, plying in, lying in, departing or trading in navigable waters, including the ports and harbors of the State. The merchandising here considered, although carried on in water-craft, is distinguished from commerce and shipping which are protected by the Federal Constitution from State tonnage taxes and duties. (See *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 56 S. Ct. 194, 80 L. Ed. 215; *Huse v. Glover*, 119 U. S. 549, 7 S. Ct. 313, 30 L. Ed. 487; *Commonwealth v. Baltimore Steam Packet Company*, 193 Va. 55, 68, S. E. 2d 137, appeal dismissed 343 U. S. 923, 72 S. Ct. 763-4, 96 L. Ed. 1335.)

FINANCIAL MATTERS, GENERALLY

August 5, 1954.—054-188.

GOVERNOR—FUNDS—TEMPORARY TRANSFERS— MINOR REGULATORY BOARDS

QUESTION: May temporary transfers of funds be made by the Governor, with the approval of the State Comptroller, pursuant to §215.18, F. S. for the use of minor regulatory boards?

To: Honorable C. M. Gay, State Comptroller:

It appears from the request for opinion that a number of minor regulatory boards of this State are confronted with the problem of a shortage of funds needed for the operation and carrying out of their statutory duties during the first part of the current fiscal year. This situation appears to have arisen by reason of a change of policy by the Legislature as to appropriations for operation of said boards and especially sub-sections 3, 4 and 5 of §215.37, F. S. as amended.

Although appropriations for the operation of such boards were made by prior legislatures from the General Revenue Fund, with the license taxes, fees and other income of said boards coming into the General Revenue Fund, the 1953 Legislature made a change in policy and, although appropriation was made from the General Revenue Fund for the 1953-54 fiscal year, no such appropriation was made for the 1954-55 and subsequent fiscal years. The following provisions of §215.37, F.S., seem material in connection with this question:

"All fees, licenses, taxes and other charges collected by minor regulatory boards, and received by the state treasurer on and after July 1, 1953, shall be deposited by the state treasurer to the credit of the individual enumerated boards in the agencies fund.

"(3) During the first year of the 1953-55 biennium, all minor regulatory boards shall be financed for the first year of the biennium from the general revenue fund to the extent that monies are appropriated therefore in the general appropriations act. On July 1, 1954, or as soon thereafter as practicable, the comptroller shall analyze the accounts of said boards and shall draw warrants, payable to the general revenue fund, and chargeable against each board's account in the agencies fund, for the amount of monies advanced from the general revenue fund during the first year of said biennium plus ten per cent of the total amount deposited to the credit of each individual board. Any balance remaining to the credit of any of these boards shall carry forward in the agencies fund and be disbursed only as authorized in the 1953-1955 appropriations act or as otherwise provided by law.

"(4) Should the amount of revenue collected by a minor regulatory board during the first year of the 1953-1955 biennium fail to exceed the amount specified in the general appropriations act or released by the state budget commission by ten per cent, then the comptroller shall cease payment of salaries and expenses until such time as said excess has been reached.

"(5) Beginning July 1, 1954, each board shall be financed solely and individually from income accruing to it from fees, licenses, taxes, and other charges collected by the board and all salaries and expenses shall be paid as budgeted after said budgets have been approved by the

state budget commission or as may be provided in the general appropriations act. Each board shall be charged ten per cent of all collections made and credited to its account in the agencies fund. The amount so charged shall be deposited in the general revenue fund.

"(6) Each board shall submit a biennial budget as required of all governmental subdivisions in Ch. 215 and 216, F.S., to be based upon anticipated revenues together with any unexpended balance of funds which may accrue to the credit of the particular board. Such budgets shall be subject to appropriate legislative action.

"(7) Each board shall operate financially within the budget approved by the state budget commission and shall deposit all fees, licenses, taxes and collections into the agencies fund to be disbursed by the comptroller only as provided by law for all agencies of government."

The effect of these provisions is to place all minor regulatory boards upon their own resources limited by other collection of fees and other lawful income.

When the warrants mentioned in sub-section (3) above were drawn and delivered it became evident that some of the minor regulatory boards were without adequate current funds for the carrying out of their duties until the coming in of their license fees and other income. In many instances licenses and fees will be due and payable on some subsequent date—some determined by examination dates and others by the due date of licenses and other taxes. The prospects for future income of the several boards vary, probably with no two of them being the same, many of the boards having sufficient current funds for proper current operation while others are without sufficient funds for such proper operation.

In so far as here material §215.18, F.S. provides that "when-ever there exists in any fund a deficiency which would render such fund insufficient to meet its just requirements, and there shall exist other funds in the state treasury which are for the time being or otherwise in excess of the amounts necessary to meet the just requirements of such last mentioned fund, the governor of the State of Florida may, with the approval of the comptroller, order a temporary transfer of funds from one fund to another in order to meet temporary deficiencies in particular funds without resorting to the necessity of borrowing money and paying interest thereon; provided, that the fund from which any money is temporarily transferred shall be repaid the amount transferred from it as soon as practicable thereafter, same to be done upon order of the Governor and approved by the comptroller, . . ." The language of this section, when read in connection with rules applicable to legislative appropriations and the limitations thereon, indicates that no transfers should be made unless and until there is satisfactory evidence that the income of the fund to which transfer is made will justify such a transfer and insure repayment to the fund or funds from which the transfer is made. Transfers under this section are provided to provide necessary operations by

the agency and to prevent cessation of necessary operation or regulation of a public function, that is to prevent a lapse in necessary governmental functions. As a practical matter it is suggested that at the time the transfer is authorized the Governor with the approval of the Comptroller shall by order indicate when repayment shall be made.

No transfers should be made until proper and ample evidence is presented to the Governor and State Comptroller showing that necessary governmental operations will cease unless such transfer is made and that the future income of the agency reasonably to be expected will insure repayment and justify the transfer. The burden is on the agency to satisfy the Governor and the State Comptroller that there are insufficient funds for necessary current governmental operations and that there is ample evidence that the income of the agency will be sufficient to repay the advance. Before any such transfer should be made there should exist a budget, duly approved by the State Budget Commission, within the income of the agency reasonably to be expected from the evidence adduced before the Governor and State Comptroller aforesaid. Once a transfer is made for the benefit of a state agency aforesaid, the accounts of such agency within the office of the State Comptroller should be carefully observed by the State Comptroller and repayment of the funds so transferred should be made at the earliest possible time.

Transfers pursuant to said §215.18, and the laws from which it was derived, have been permitted many times (see 1927-8 AGO 123, 188; 1933-4 AGO 444, 446, 637; 1937-8 AGO 205, 348; 1939-40 AGO 265; and 1943-44 AGO 237) many of such transfers having been to the General Revenue Fund (see 1933-4 AGO 444, 446, 637; 1937-8 AGO 348; and 1943-5 AGO 237). If transfers may be made to the General Revenue Fund we see no reason why such transfers may not be made from said fund.

The above question is, therefore, under the above limitations answered in the affirmative.

February 11, 1953.—053-31.

"USE TAXES"—APPLICATIONS FOR REFUNDS— LIMITATIONS—§215.26, F.S.

QUESTIONS: Where *use taxes* were paid into the State Treasury, pursuant to §6, Ch. 26319, Laws of Florida, Acts of 1949, which section, in so far as it provided for such use taxes, was held invalid subsequent to such payment, may applications for the refund of such taxes be made under and pursuant to §215.26, F. S.?

2. Under the above mentioned circumstances, from what date do the limitations contained in said §215.26 begin to run?

To: Honorable C. M. Gay, State Comptroller:

The use tax provision in said §6, Ch. 26319, Laws of Florida, Acts of 1949, was held to have not been included in the title to the said chapter and, therefore, violative of §16, Art. III, of the State Constitution, (see *Thompson v. Inter-County Telephone and Tele-*

graph Company, not yet reported) and therefore inoperative prior to the adoption of Florida Statutes, 1951, on April 25, 1951 (see Ch. 26484, Laws of Florida, Acts of 1951). Ch. 26319, Laws of Florida, Acts of 1949, took effect and became operative on November 1, 1949. We are, therefore, interested only in those use taxes levied and assessed upon transactions occurring between November 1, 1949 and April 25, 1951, during which time the said use tax was inoperative for technical reasons.

Under §215.26, F. S., the State Comptroller is authorized to "refund to the person who paid the same, or his heirs, personal representatives or assigns, any moneys paid into the state treasury which constitutes: (a) An overpayment of any tax, license or amount due; (b) a payment where no tax, license or account is due; and (c) any payment made into the state treasury in error." The payments of use taxes levied for transactions occurring between November 1, 1949 and April 25, 1951, in the light of the above *Thompson v. Inter-County Telephone and Telegraph Company* case, would seem to be within the purview of the above mentioned §215.26, F. S. (see *State v. Lee*, 156 Fla. 291, 22 So. 2d 804; *Walgreen Drug Stores Company v. Lee*, 158 Fla. 260, 28 So. 2d 535; *State v. Gay*, Fla., 40 So. 2d 225).

Said §215.26, F. S. requires that applications for refunds thereunder "shall be filed with the Comptroller within one year *after the right to such refund* shall have accrued else such refund shall be barred. . . ." The statute of limitation provided by said §215.26, "is not of a general application but one in relation to claims against the Comptroller" (*State v. Gay*, Fla., 40 So. 2d 225, text 228) and has been held to be applicable to claim for refunds of chain store taxes paid (*State v. Gay*, 158 Fla. 164, 27 So. 2d 907) and to claims for refunds of intangible taxes paid (*State v. Gay*, Fla., 40 So. 2d 225). In these cases the court appears to have followed the general rule that a special statute of limitations applicable to actions for recovery of taxes paid run from the date of the payment of the tax and not from the date of an adjudication of the invalidity of the tax or when the taxpayer becomes advised of the illegality of the tax. (See 61 C.J. 999, section 1277). The Federal Commissioner of Internal Revenue was held, in *United States v. Garbutt Oil Company*, 302 U. S. 528, 58 S. Ct. 320, 82 L. Ed. 405, to be without authority to waive the limitations fixed by the federal statutes for filing claims for tax refunds. We know of no reason why this rule is not also applicable to claims for refunds under said §215.26, F. S.

In the light of the above statutes, authorities and observations, we feel that said §215.26, F. S., is applicable to use taxes upon transactions occurring between November 1, 1949 and April 25, 1951, and that applications for refunds of such taxes may be made thereunder; however, such claims will be barred by the limitations in said §215.26 unless filed within one year from and after the date of the payment of the tax.

STATE BUDGET COMMISSION

July 9, 1953.—053-146.

STATE BUDGET COMMISSION—DUTIES AND POWERS—
BUDGETS OF THE GAME AND FRESH WATER FISH
COMMISSION—CH. 216, F. S., NOT APPLICABLE

QUESTION: What control, if any, does the State Budget Commission have over the Budgets and funds of the Game and Fresh Water Fish Commission?

To: The State Budget Commission:

This question involves a construction of Ch. 216, F. S., as amended by Ch. 27994, Laws of Florida, Acts of 1953, the General Appropriations Act for the biennium beginning July 1, 1953, (Ch. 28115, Laws of Florida, Acts of 1953) and Ch. 28231, Laws of Florida, Acts of 1953, in the light of §30, Art. IV, of the State Constitution, which constitutional provision, in so far as here material, is as follows:

- (5) The Commission shall appoint, fix the salary of, and at pleasure remove, a suitable person as Director, and such Director shall have such powers and duties as may be prescribed by the Commission in pursuance of its duties under this Section. Such Director shall, subject to the approval of the Commission, appoint, fix the salaries of, and at pleasure remove, assistants, and other employees who shall have such powers and duties as may be assigned to them by the Commission or the Director. No commissioner shall be eligible for any such appointment or employment.
- (6) The funds resulting from the operation of the Commission and from the administration of the laws and regulations pertaining to birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians, together with any other funds specifically provided for such purpose shall constitute the State Game Fund and shall be used by the Commission as it shall deem fit in carrying out the provisions hereof and for no other purposes. The Commission may not obligate itself beyond the current resources of the State Game Fund unless specifically so authorized by the Legislature.
- (7) The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect. All laws fixing penalties for the violation of the provisions of this amendment and all laws imposing license taxes, shall be enacted by the Legislature from time to time.

Chapter 216, F. S., as amended by Ch. 27994, Laws of Florida, Acts of 1953, relates to the State Budget Commission and defines the duties, powers, functions, etc. of the Budget Commission, along with the duties of the Budget Director. Each of the several depart-

ments, bureaus, divisions, officers, commissions, institutions, boards, and all other state agencies, *created by legislative act* and supported by any form of taxation or licenses, fees, imports or exactions, is required to report to the Budget Director certain information at specified times (§216.02, F. S., as amended.) The fact that *only* agencies created by legislative act are under any duty under said Section 216.02 to report to the Budget Director clearly indicates that the Game and Fresh Water Fish Commission, a constitutionally created commission, was not intended by the Legislature to, and does not, come under the jurisdiction of the State Budget Commission.

Chapter 28115, Laws of Florida, Acts of 1953, the Biennial Appropriations Act, for the biennium beginning July 1, 1953, appropriated out of the General Revenue Fund, certain sums for administrative and other expenses to be used by the several state Departments, bureaus, etc. of the State of Florida and supported by any form of taxation or licenses, etc. Said Ch. 28115, when studied in its entirety, in the light of §30, Art. IV, Const. of Florida, indicates that the various restrictions and limitations imposed upon the several state agencies and departments by said act were not intended to, and do not, apply to the Game and Fresh Water Fish Commission.

Chapter 28231, Laws of Florida, Acts of 1953, provides, among other things, for the disposition of funds received by certain state regulatory boards and the budgeting of funds for operation of such boards and requires that annual budgets and reports be made to the State Budget Commission by all state spending agencies. We do not think the Game and Fresh Water Fish Commission is a spending agency within the purview of said Ch. 28231.

Sub-section (6) of §30, of Art. IV, F. Const., which gives the Game and Fresh Water Fish Commission the right to use the State Game Fund as the commission "shall deem fit in carrying out the provisions hereof," is so broad as to give the Commission the authority to make such provisions and fix salaries, etc. as are necessary to carry out its duties and responsibilities without regard to the statutory limitations placed upon other agencies. The application of the statutes under consideration to the Game and Fresh Water Fish Commission would result, we think, in placing a limitation on the constitutional powers of the Commission and, therefore, said statutes are not in aid of, but on the contrary, are inconsistent with the provisions of Sub-section (6), of §30, of Article IV, Florida Constitution.

In the light of the foregoing observations, we are of the opinion that Ch. 216, F. S., as amended by Ch. 27994, Laws of Florida, Acts of 1953, Ch. 28115, Laws of Florida, Acts of 1953, and Ch. 28231, Laws of Florida, Acts of 1953, was not intended to give the State Budget Commission any powers or duties over budgets of the Game and Fresh Water Fish Commission created by §30, Art. IV, Florida Constitution.

PROPERTY EXEMPT FROM TAXATION; WIDOWS AND DISABLED PERSONS

April 20, 1954.—054-95.

TAX EXEMPTIONS—PERSONS DISABLED BY WAR OR MISFORTUNE

QUESTION: What percentage or degree of disability suffered in war or by misfortune is necessary to entitle a person to the tax exemption provided to "persons disabled in war or by misfortune," by §9, Article IX, of the State Const.?

To: Hon. Harry E. King, City Attorney, Winter Haven, Fla.:

Said §9, Art. IX, of the State Const., provides that "there shall be exempt from taxation property to the value of five hundred dollars to every widow and to every person who is a bona fide resident of this State and who has lost a limb or been disabled in war or by misfortune." This provision has existed in substantially its present form since the adoption of the 1885 State Const.; however, we find no like or similar provisions in prior state constitutions.

When first introduced into the constitutional convention said section made no reference to "persons disabled" in war or by misfortune, but referred to "every person who has lost a limb in war or by misfortune," the phrase "persons disabled" having been inserted by amendment. (Journal 217, 276 and 350). Section 192.06(7), F. S., appears to be merely declaratory of the constitutional provision. Neither the Constitution nor the Statute defines the word "disabled" as used in the said constitutional and statutory provisions, unless §192.11, F. S., may be said to adopt the federal rule as to war veterans. This section makes disability certificates issued to war veterans by the federal government evidence of their disability under said constitutional and statutory provisions.

Although not applicable to tax exemptions hereunder we note §205.16, F. S., which makes "a certificate of government rated disability to an extent of ten per cent, or more" evidence of disability within the purview of said section of the statute. To entitle one to the exemption under §205.15, F. S., for one to obtain exemption from occupational license taxes under said section he should show that he is "physically incapable of manual labor . . ."

A former Attorney General and later Justice of the Supreme Court of this State, by opinion dated June 11, 1928, after quoting from the constitutional provision, stated:

"The statutes of Florida do not undertake to define the amount of disability which must exist in order to entitle the person to exemption authorized.

"The question is, therefore, left to each tax assessor to determine for himself as a question of fact and I would suggest that inasmuch as the U. S. Government has prescribed the rule for determining disabilities of soldiers as a basis for claim upon Federal bounty that each tax assessor might

adopt the same rule to be used by him in determining when disability exists.

"In other words, where a claim of disability would be allowed by the U. S. Government as a claim against the government as a basis for Federal bounty or Federal benefit, that such claim or disability be likewise allowed as an exemption from taxation under this section of the Constitution." (1927-8 Biennial Report 430)

And by opinion dated February 12, 1941, further stated in part as follows:

"... each case of a claim for property tax exemption asserted under §9 of Art. IX of the Constitution must be allowed upon the facts of the case presented to the tax assessor, irrespective of any technical rating which the Federal Government may have placed on the veteran under a Federal law, concerning pensions, allowances and the like. While such a rating or a certificate of disability received from the Federal Government may furnish evidence upon which the tax assessor may exercise his own independent judgment, at the same time, it is the duty of the tax assessor to investigate every claim for exemption and to determine from the facts presented to him, irrespective of what rating may have been given by the Federal Government to the veteran, whether or not the veteran was in the eyes of the law and the Florida Constitution 'disabled in war.'

"I have suggested to tax assessors that since the Board of County Commissioners have to approve the equalization of the tax roll, and since the allowance of exemptions on the question of equalization, that all of these claims for exemption before they are allowed, together with the evidence supporting the same, be filed with the County Commissioners, and be approved by the commissioners before they are granted by the tax assessor." (1931-2 Biennial Report 667 and 668).

Another former Attorney General, by opinion dated June 12, 1931, (1931-2 Biennial Report 687), after referring to the said constitutional provision, said that "we do not construe the provision of the Constitution to mean that one who may have been slightly disabled and who has since recovered, or who may continue to be slightly disabled but not disabled to the extent that he cannot engage in any remunerative occupation, to be entitled to the exemption..." The same Attorney General, by opinion dated July 10, 1931, (1931-2 Biennial Report 471), stated that "it is my opinion that the Legislature meant to state definitely that anyone who has lost a limb was entitled to this exemption, but where one has been disabled by war or misfortune, it seems to me that it is a matter of determination by the taxing authorities whether or not the misfortune is such as to disable the person from making a livelihood. This particular part of the statute, it seems to me, is really a matter of practical application..."

A person may be disabled by reason of his inability to pursue

his customary occupation notwithstanding his ability to do other work (*Moore v. Pacific Mutual Life Insurance Company*, 128 Neb. 605, 259 N.W. 916). The loss of a limb might disable one person from following his occupation or type of work, while it might be largely an inconvenience to another person following a different occupation, profession or type of work. Disability means the inability of a person to carry on his regular occupation, profession or work, or to attend to his affairs (*Corsones v. Monarch Accident Insurance Company*, 103 Vt. 154 A. 693, text 695; *Wright v. Prudential Insurance Company*, Cal. App. 80 P. 2d. 752, text 763; *Ozark Mutual Life Association v. Winchester*, 116 Okl. 116, 243 P. 735, text 736). Disability in the loss inuring from personal injury which detracts from the former efficiency of the workman's body or its members in the ordinary pursuits of life in relation of the field of service to which he is suited (*Kalson v. Star Electric Motor Company*, 15 N.J.S., 565, 93 Atl. 2d, 656, text 660).

The above stated question is not subject to a fixed and definite answer. The percentage or degree of disability suffered by a person is to be determined from each particular case and no general rule may be applied. The question is, therefore, left to each tax assessor to determine for himself as a question of fact, in each particular case as it arises, under the above stated rules and observations.

INCOME TAX PROHIBITED; INHERITANCE TAX; EXEMPTION FOR HEAD OF FAMILY

January 26, 1953.—053-14.

PERSONAL PROPERTY EXEMPTION—"HEAD OF FAMILY" —DEPENDENTS—ART. IX, §11, FLA. CONST.

QUESTION: Is a person who has a niece and nephew as his dependents considered "the head of a family," within the meaning of §11, Art. IX of the State Constitution?

To: Messrs. Weinkle and Kessler, Attorneys at Law, Miami, Dade County, Florida:

Section 11, Art. IX, of the State Constitution, provides in part that "there shall be exempt from taxation to the head of the family residing in this State, household goods and personal effect to the value of Five Hundred (\$500.00) Dollars." This language is similar to that in §1, Art. X, of the same constitution, which provides that "a homestead . . . owned by the head of a family residing in this state . . . shall be exempt from forced sale under process. . . ." Doubtless a person qualifying as a head of a family for homestead exemption from execution would also qualify as a head of a family under said §11, Art. IX.

Who is the head of a family within the above constitutional provision must be ascertained from the facts of each case, and to constitute a "head of a family" two or more persons must be living together in the relation of one family and one of them must be

"head of that family." (Anderson v. Anderson, Fla. 44 So. 652, text 654 and 655).

Many different combinations of persons have been held to constitute a family under homestead statutes and laws (40 C. J. S. 446-7 §23). A single woman and two minor children of a deceased sister whom she supported (Arnold v. Waltz, 53 Iowa, 706, 6 N. W. 40) or a person and one or more of his or her nephews or nieces (Ex Parte Brien, 2 Tenn. Ch. 33; Lazarus v. Girt, 36 S. C. 576, 15 S. E. 721; American National Bank v. Cruger, 31 Tex. Civ. App. 17, 71 S. W. 784) have been held to constitute a family under proper circumstances. See also annotation in 118 A. L. R. 1386 and 19 Words and Phrases "Head of Family", 132 et seq.) There must be a moral duty of the alleged head of the family to support the members of the family although there need not be a strict legal duty.

It, therefore, appears that where a person in good faith maintains a home for and supports one or more of his or her minor nephews or nieces (which might also include disabled adult nephews or nieces unable to support themselves) and supports them, that he would be the head of a family within §11, Art IX. of the State Constitution.

HOMESTEAD AND EXEMPTIONS

December 22, 1953.—053-335.

HOMESTEAD TAX EXEMPTION—PROPERTY— LONG TERM LEASE

QUESTION: Is title based upon a long term lease (for example a 99-year lease) within the purview of §7, Art. X, of the State Consti., so that homestead tax exemption may be based thereon?

To: Messrs. Weinkle and Kessler, Attorneys at Law, Miami, Dade County, Florida:

For a person to be entitled to homestead tax exemption under §7, Art. X, of the State Consti., such person must have "the legal title or beneficial title in equity to *real property* in this state" and must reside thereon and make the same his permanent home or the permanent home of someone dependent upon him.

Except where modified by statute (and we know of no such statute in this state) leases for terms of years, however long, are chattels real falling within the classification of personal property (51 C. J. S. 531, §26; 32 Am. Jur. 39, §16). In this connection see also 51 C. J. S. 763, §37; 61 C. J. 210, §184; 2 Cooley on Taxation, 4th Ed., 1268, §593. Being personal property and not real property, a long term lease for a given number of years cannot be made the basis for homestead tax exemption under said §7, Art. X, of the State Constitution.

This answers the above question in the negative.

November 17, 1954.—054-249.

HOMESTEAD PROPERTY—LIABILITY—BONDED DEBT OF MUNICIPALITY ANNEXED TO

QUESTIONS: 1. Where homestead property is annexed to a municipality does it become liable to ad valorem taxation to pay a bonded indebtedness incurred prior to the adoption of the homestead tax exemption amendment?

2. Would such homestead property be taxable for the maintenance of a municipal improvement established prior to the adoption of the homestead tax exemption amendment?

To: Honorable Sidney F. Dick, County Tax Assessor, Brooksville, Florida:

The statutes and constitutional provisions under which a bonded indebtedness payable from ad valorem taxation is issued become a part of the obligations of the bond contract and therefore within the protection of the contract clause of §10, Art. I, of the United States Const., and may not be altered or impaired by a State Const. or statute subsequently adopted. This rule forms the basis for

the assessment of ad valorem taxes against homesteads for the payment of pre-existing bonded indebtednesses. (State v. Boring, 121 Fla. 781, 164 So. 859; State v. Port of Palm Beach District, 121 Fla. 746, 164 So. 851; Long v. St. John, 126 Fla. 1, 170 So. 317; Board of Public Instruction v. State, 145 Fla. 482, 199 So. 760; City of Coral Gables v. State, 128 Fla. 874, 176 So. 40; Yowell v. Rogers, 128 Fla. 881, 175 So. 772). "Where an amendment to the state constitution exempts from taxation property that was therefore required to be assessed for taxation, such state organic exemption from taxation is controlling, and the property so exempted is not subject to taxation, unless and to the extent that the exemption if allowed would violate the contract or other dominant provision of the federal constitution." (Long v. St. John, 126 Fla. 1, 170 So. 317, text 321).

The homestead property in question being outside of the municipality when the bonded indebtedness was incurred was and could not have been subject to municipal taxation for the payment of the bonded indebtedness in question nor for the maintenance of any municipal improvement. In fact until the time it was annexed to the municipality, which we understand was a time long subsequent to the adoption of the homestead tax exemption amendment, it was subject to no municipal taxation. So far as we are advised the homesteads in question in no way entered into the bonding contract and were in no way bound by it when incurred. The bondholders had, at the time of the adoption of the homestead amendment, no right to have the homesteads in question taxed for their benefit. The exemption of the said homesteads from taxation in no way affects the bond contract between the municipality and the bondholders so as to be within the protection of the contract clause of the federal constitution.

Each of the above questions is answered in the negative.

September 9, 1954.—054-219.

TAX EXEMPTIONS—COMBINATION DWELLING AND BUSINESS HOUSE—WIDOWS AND DISABLED PERSONS

QUESTIONS: 1. Where the owner of real property in this State uses the ground floor thereof for business purposes and the top floor as his permanent home, is he entitled to homestead tax exemption on the entire building if assessed at five thousand dollars or less?

2. Are the tax exemptions to widows and disabled persons under §9, Art. IX, of the State Const., applicable to assessments for sinking fund purposes?

To: *Honorable J. Frank Roberts, City Clerk, Inverness, Florida:*

Under §7, Art. X, of the State Const. "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property, as defined in §1, Art. X, of the Const.

..." Under §9, Art. IX, of the State Constitution, "there shall be exempt from taxation property to the value of five hundred dollars to every widow and to every person who is a bona fide resident of the State and has lost a limb or been disabled in war or by misfortune."

We gather from the separate opinions filed in the case of *Smith v. Guckenheimer*, 42 Fla. 1, 27 So. 900, that the head of a family occupying the second story of a building as his home and the first story as his business house is entitled to claim such a building as his homestead, except as to the portion not used by him either as his business house or his home. In this case the owner was granted homestead in the portion of the building used by him as his business house and the portion of the second story used by him as his home; although denied homestead rights as to the portion not so used. Under Art. X of the State Const. a homesteader is entitled to claim as exempt his dwelling house and business house in a municipality, provided they do not occupy more than one-half acre of contiguous land. Any portion of the property, although within said one-half acre, not so used may not be exempted as a homestead. Any part of the homestead property not used by the owner, as his dwelling house and its curtilage or business house in which his own business is operated, is not entitled to exemption although within the one-half acre area. These observations seem to answer the first above question.

The five hundred dollar tax exemption in §9, Art. IX, of the State Const., clearly extends to all widows (but does not include divorcees) and to all persons, whether war veterans or not, who have been disabled or lost a limb either in war or by misfortune, provided they are bona fide residents of this State. This exemption extends to all ad valorem taxes, whether levied for sinking funds or not, at least as to sinking funds to pay debts or bonds created since 1916, being the date of the original adoption of the constitutional provision. This seems to answer the second question.

February 23, 1953.—053-45.

LIFE ESTATES AS EXEMPT HOMESTEADS REMAINDER TAXABLE

QUESTIONS: 1. Where a person residing in this state purchases a life estate in real property and makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon such person, is the said property entitled to homestead tax exemption under Section 7, Article X, of the State Constitution?

2. If the first above question is answered in the affirmative, what is the tax status of the remaining estate not vested in the homestead claimant?

To: Honorable C. M. Gay, State Comptroller:

Under §7, Art. X, of the State Constitution, "every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of an-

other or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property . . . said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear . . . nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. . ."

The question is raised as to whether a life estate in real property is a legal title or beneficial title in equity within the purview of §7, Art. X, of the State Constitution. Although leasehold interests for years (no matter how long) have been considered as personal property, leasehold estates for life have usually been considered as freeholds or real property (Black's Law Dictionary; 31 C.J.S. 16, Section 7; 73 C.J.S. 159, Section 7; 33 Am. Jur. 460, Section 2.) The life estate would, therefore, appear to be a "legal title or beneficial title in equity" and within the purview of §7, Art. X, of the State Constitution; however, this exemption from taxation may not exceed in amount of the interest owned by the said owner of the life estate. In short the homesteader's interest is the only one entitled to exemption. This is recognized by the constitutional provision when it provides that "nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person." This answers the first above question.

Although it has been stated "that in Florida authorization for the taxation of separate interests in real estate does not exist" and that "under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value, regardless of the existence of estates in it" (Bancroft Investment Corporation v. City of Jacksonville, 157 Fla. 546, 27 So. 2d 162, text 166 and 167); however, it was also stated in this same case "That this is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature" in a lawful manner (27 So. 2d. text 170). When the constitution provides that "nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person," it by implication, at least, requires the separation of the interest entitled to exemption from all other interests in the property. The term "real property" includes remainders after an existing life estate (73 C.J.S. 159, §7). Where property owned by a fraternal association is used in part for exempt purposes and in part not for such exempt purposes, the portion used for non-exempt purposes is subject to taxation (Simpson v. Bohon, 159 Fla. 280, 31 So. 2d. 406).

Where a life estate has been conveyed there would be either a vested remainder in another (26 C.J.S. 407, §114) or a reversion in the grantor (26 C.J.S. 410, §115). The title to the remainder would at all times be vested in some person, firm or corporation. This remainder or reversion would be subject to transfer for a valuable consideration at all times. The overall value of the real property would be divided into the value of the life estate and the

value of the remainder or reversion. As the constitutional provision which provides for homestead exemption limits the exemption to the value of the interest of the homesteader, when the homesteader's interest is merely a life estate there remains another valuable estate in the real estate, that is the remainder or reversion. The second question above is, therefore, answered by stating that the said remainder or reversion is subject to taxation notwithstanding the existence of the exempt homestead life estate. This was substantially the holding in an opinion of this office, under date of October 29, 1952 (052-298), rendered to the Florida State Improvement Commission.

January 28, 1953.—053-18.

PERSONAL PROPERTY—LIENS—APPRAISAL—EXEMPTIONS UNDER ART. X, §1, FLORIDA CONSTITUTION

QUESTION: When appraising property claimed to be exempt under §1, Art. X, of the State Constitution, when such property is subject to a lien or retained title agreement, should the amount secured by the lien, or the unpaid balance under the retained title contract, be taken into consideration in determining the value of the alleged exempt property?

To: Honorable Dave Starr, Sheriff, Orange County, Orlando, Florida:

Under §1, Art. X, of the State Constitution, each head of a family residing in this state is entitled to "one thousand dollars worth of personal property" exempt from forced sale under process, except for certain obligations not here material. Section 222.06, F. S., provides for an appraisal of personal property claimed as exempt under the above constitutional provision. Although the appraisal is provided for by said §222.06, the point of determination is the value of the property under said §1, Art. X, of the State Constitution.

It is frequently provided by constitutional or statutory provision, for the purpose of protecting debtors from destitution, or their families from deprivation of support, or the public from the danger of their becoming public charges, that certain property shall be exempt from process (35 C.J.S. 6 et seq., §1); such a provision is §1, Art. X, of the State Constitution. Such laws are to be construed liberally, in favor of the persons within their purview, so as to effectuate their beneficent purposes (35 C.J.S. 12 §4). The above constitutional provision not only provides for the above exemption of personal property but also a homestead exemption of real property to the heads of families in this State. The said constitutional provision should receive a liberal construction in favor of the homestead and exemption claimant (Richards v. Byrnes, 153 Fla. 705, 15 So. 2d 610; Patten Package Company v. Houser, 102 Fla. 603, 136 So. 353, text 355; Milam v. Davis, 97 Fla. 916, 123 So. 668, text 690; Jetton Lumber Company v. Hall, 67 Fla. 61, 64 So. 440). The purpose of homestead and exemption statutes and laws being designed as a protection against the family being thrown on charity and to prevent the family from becoming a public charge, the constitutional provision should be liberally construed to make effective this purpose.

"It is generally held that, in ascertaining the value of premises claimed as a valid and subsisting homestead, legal encumbrances are deducted, unless the encumbrance is subject to, or inferior to, the homestead right, in which case it should not be deducted," (40 C.J.S. 501, §62); however, there are a few authorities holding otherwise. The question seems to be one of first impression in this state, as far as the decisions of the Supreme Court reflect. We feel that it was the intention of the framers of the State Constitution to protect each head of a family, in so far as his property would permit as a bulwark against becoming public charges. A thousand dollars in gross value of personal property encumbered with a lien for nine hundred dollars would in effect be giving its owner only one hundred dollars to stand between him and becoming a public charge. To make the constitutional exemption effective for the purpose intended it must be construed in such a way as to give the head of a family personal property with a net value of one thousand dollars. Where there are liens and mortgages encumbering the property it should clearly appear that they were intended to honestly encumber the property and that they were not designed to defeat the exemption laws. The creditor should be permitted to contest the validity of the liens and mortgages encumbering the property of a debtor, should he desire to do so.

It is doubted that the interest of a vendee under a retained title contract is anything more than an equitable title; the legal title is vested in the seller until the purchase price is paid in full. The vendee's equitable interest in the property may change from time to time until the purchase price is paid in full.

We feel that the above question should be answered in the affirmative; however, we realize that it is a question that may be finally answered only by the Supreme Court; this being true the sheriff would be justified in requiring security to properly protect himself in the matter.

July 9, 1954.—054-158.

HOMESTEAD TAX EXEMPTION—ALIEN ON TEMPORARY VISA

QUESTION: May an alien in this country on temporary visa (which is renewable every nine months) be granted homestead tax exemption in this State?

To: *Honorable C. M. Gay, State Comptroller:*

For a person to claim homestead tax exemption in this State he must not only be possessed of a legal or beneficial title in equity to real property in this State and "in good faith make the same his or her *permanent home*, or the *permanent home* of another or others legally or naturally dependent upon said person . . ." (§7, Art. X, State Const.) A property owner who in good faith makes his permanent home upon real estate owned by him in this State may claim homestead tax exemption thereon although he is not a United States citizen (*Smith v. Voight*, 158 Fla. 366, 28 So. 2d. 426). The question is, therefore, one of *permanent residence or home* and not of citizenship.

For one to be a permanent resident of this State he must have a fixed and definite intention of remaining in this State and making his home therein permanently with no present intention of removing therefrom in the future (opinion of September 12, 1949; 049-586; 1949-50 Biennial Report 218.)

A person in this country under a temporary visa cannot meet this requirement of permanent residence or home. The above question is answered in the negative.

CHAPTER XV

EDUCATION

STATE PLAN FOR PUBLIC EDUCATION

March 30, 1953.—053-69.

COUNTY SCHOOL BOARD—AUTHORITY—COUNTY FUNDS TO ESTABLISH JUNIOR COLLEGE

QUESTION: Would it be within the legal bounds of the authority of a county school board to establish and conduct a Junior College (grades 13-14) strictly out of local county funds entirely outside the Foundation Program and with no contribution of state funds from this or other state source?

To: Honorable Thos. D. Bailey, Superintendent, State Department of Education:

Section 228.13, F. S., states that the public schools of Florida must provide for 12 consecutive years of instruction. Section 228.15, F. S., provides that the general control of the public schools shall be vested in the State Board of Education and the direct control of the public schools in each county shall be vested in the county board of that county. I know of no state board regulation which would prohibit a county board from operating a junior college entirely from its own funds.

Section 228.16 (4), F. S., provides:

"Thirteenth and Fourteenth Grades (Junior College). Junior colleges and technical or vocational schools offering work in the thirteenth or fourteenth grades or schools offering ungraded work for persons regardless of age, when organized as a part of the public secondary school system in accordance with the provisions of law, shall be supported and maintained from funds derived from state, county, district, federal or other lawful sources or combinations of sources; provided, that tuition or matriculation fees may be charged only if and as authorized by regulations of the state board."

I gather from this section of the law that a junior college may be operated by a county board if it so desires as provided by law, but that such school facilities are not mandatory as is the case of elementary and high schools through grade 12, as required by §228.13.

Section 228.16(4) quoted above would appear to authorize a county board to operate a junior college entirely from county funds or from a combination of funds.

Section 242.41, F. S., provides that no junior college may be established or taken over by a county board until the proposed

plan of operation and financial support has been submitted to and approved by the State Board.

Section 242.42 provides additional requirements and procedures necessary in establishing junior colleges.

Your attention is also directed to State Board Regulations adopted on March 21, 1950, and July 27, 1948, relating to junior colleges.

As stated above, however, I find no statute or Board regulation which would forbid a county board from operating a junior college entirely from local funds if it otherwise complied with the requirements of the law and State Board regulations.

Subject to the above observations, your question is answered in the affirmative.

COUNTY SCHOOL SYSTEM

June 4, 1953.—053-119.

COUNTY SCHOOL BOARD—ATTORNEY'S FEE FOR SUPER- INTENDENT PUBLIC INSTRUCTION—PAYMENT AUTHORIZED

QUESTION: Can a county school board pay attorney's fees for an attorney to represent the county superintendent of public instruction in a court action to determine the respective duties and authority of the superintendent and board?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

County boards of public instruction are granted by law broad discretionary powers in securing necessary services for the county school system. Section 230.23(12)(i) relating to powers and duties of the county board provides: "contract for materials, supplies and services needed for the county school system . . ."

In the case of *State vs. Culbreath* (Fla.) 174 So. 422, the court made the following observation:

"The prosecution and defense of legal causes must necessarily, under the system of jurisprudence obtaining in this country, be done by legal representatives in the courts provided by law for the adjudication of controversies. The power carries with it the necessary implication, therefore, that counsel may be employed by the boards of county commissioners whenever in the judgment of such boards the interest of the counties require the services of counsel in the courts, whether state or federal, within whose jurisdiction the controversies in which the counties are interested may lie."

I assume from the wording of your question that a legal controversy has arisen between a county school board and the county

superintendent of public instruction as to their respective powers and duties which cannot be resolved except through judicial action. The board is a statutory body with broad powers and duties relating to control of the county school system. The county superintendency is a constitutional office with certain duties and administrative authority fixed by law.

If there is an honest difference of opinion between the board and the superintendent as to their proper legal authority, I believe that it would be proper and necessary to have such differences resolved by the courts in the interest of the county school system.

Since obviously the regularly employed county school board attorney could not undertake to represent both the board and the superintendent, it is my opinion that the board would have authority to employ a special attorney to represent the superintendent in presenting the issues properly before the court if the board considers such action necessary and in the best interest of the school system.

Your question is therefore answered in the affirmative, subject to the above observations.

May 8, 1953.—053-97.

COUNTY SCHOOL BOARD—AUTHORITY—TRANSFER OF TEACHERS

QUESTION: Where the principal of a school desires to transfer a teacher, in his school, from one grade to another, and the County Superintendent of Public Instruction desires that such transfer be not made, is the Superintendent's decision on the question whether the transfer shall be made final, or is the question one on which final decision must be made by the county board of public instruction?

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

I find no specific statutory provision of the school code which answers your question.

It is apparent, however, throughout the plan of operation for schools as prescribed by the statutes that the general control of all county public schools is vested in the county school board.

Section 230.35, F. S., provides:

"Schools under control of county board and county superintendent.—All public schools conducted within school districts, for the support of which school district funds are used, shall be under the direction and control of the county board with the county superintendent as executive officer and shall be subject to the same laws and rules and regulations as are prescribed for the conduct for all schools in the county, except as hereinafter provided."

As I understand this provision, the superintendent is the executive officer of the county board and charged with carrying out

the general policies of the board, together with such specific duties as may be prescribed by law.

Section 230.33, provides certain specific duties of the county superintendent. Most of these duties consist of purely administrative functions together with the responsibility of recommending procedures and operational changes to the county board. Section 230.33 (7) (h), for example, provides:

"Transfer and promotion.—Recommend employees for transfer and transfer any employee during any emergency and report the transfer to the county board at its next regular meeting; provided, that if the school to which the transfer is to be made is a district school and is located in another district from the one in which the employee was previously serving, the consent of the trustees shall be obtained, as provided herein, before the transfer is made; and recommend capable employees for promotion and advancement."

It is indicative of the general intent of the legislature to provide that policy-making changes, such as the transfer of a teacher from one job to another or one grade to another, are subject to the approval of the school board.

In view of the above, it is my opinion that your question must be answered as follows: Final authority for the transfer of a teacher from one grade to another is vested in the school board.

March 9, 1953.—053-57.

COUNTY COMMISSIONERS' DISTRICTS—RE-DISTRICTING—
EFFECT UPON COUNTY SCHOOL BOARD MEMBER
DISTRICTS—§§230.06, 230.07, F. S.

QUESTION: Where the Board of County Commissioners adopt a resolution re-districting the county, what effect does this have upon the designation of county school board member districts?

(a) Are such school board member districts automatically changed?

(b) Is the school board required to adopt a resolution changing its county school board member districts to correspond to the county commissioners' districts? If so, when?

(c) What effect does it have upon the school board members whose districts are changed thereby?

To: Honorable George C. Dayton, Attorney, Board of Public Instruction, Pasco County, Dade City, Florida:

County school board member residence districts and election districts and their method of determination is provided by §§230.06 and 230.07, F. S. In my opinion, a change in county commissioner districts by the county commissioners would not automatically change the school board districts which may be fixed and altered if desired by the school board itself. As to the proper method for

changing county commissioner districts in Pasco County, see copy of Attorney General's Opinion 050-152, copy enclosed.

In order to comply with the requirements of the law, the school board should proceed under §230.07, F. S. by proper resolution during a meeting next January to fix its board member districts "so as to place in each district as nearly as practicable the same number of qualified electors, the lines of said districts to be so drawn as to place each election precinct wholly within one or another of the county board election districts" (§230.06). These school board districts may coincide with the county commissioner districts or not, as the school board may choose as provided by §230.07.

For a more detailed discussion of the problems involved, see Attorney General's Opinions 047-163, 052-19 and 048-14, copies enclosed.

As to your third question, I am of the opinion that present members of the school board would not be affected by changes in the county commissioner districts by the county commissioners or by changes in the school districts if they are made by the school board next January until such time as the members could be properly elected or appointed to serve in their proper residence districts. See Attorney General's Opinions 047-305 and 046-389, copies enclosed.

March 19, 1953.—053-67.

SCHOOL DISTRICTS—TRUSTEES—VACANCY— METHOD OF FILLING

QUESTION: If a duly elected school trustee should resign, leaving a vacancy in that position, is it mandatory that the board of public instruction fill this vacancy from the particular commissioner district in which the resignation occurs, or does the board have the discretion of appointing a trustee from another commissioner district in the event that such appointment would not result in one commissioner district having two trustees?

To: *Honorable G. E. Bryant, Jr., Attorney for Board of Public Instruction, Okeechobee County:*

Section 230.34 (3), F. S., provides:

"Three trustees for said 'Special Tax School District Number 1' shall be elected by the qualified electors of said county at the time and place prescribed by or fixed pursuant to law, but not more than one trustee shall come from any one residence district for which a county board member is provided for by law. The persons qualified to hold such office and who receive the greatest number of votes cast for election of trustees, subject to the limitation prescribed above, shall serve for the ensuing two years as trustees for said school district."

Section 230.23 (13) (b), F. S., provides, in part:

"... If, after any biennial election in which trustees are

elected for any district, a vacancy should occur among the trustees, the county board shall appoint, after consulting with the patrons of the school, a qualified person from the district to serve in the position of trustee until the next biennial election."

The above cited statutes appear to answer your question. The school board is authorized to fill a vacancy in the office of school trustee. The board cannot appoint a trustee who resides in the same residence district with another trustee, since all three trustees must reside in separate districts. There appears to be no mandatory duty on the part of the school board to appoint an individual to fill a vacancy as school trustee from any particular district so long as no more than one trustee resides in any given district.

Your question is therefore answered accordingly.

January 9, 1953.—053-5.

COUNTY SUPERINTENDENT AND SCHOOL BOARD— SPACE IN COURTHOUSE

QUESTION: Is it mandatory that the Board of County Commissioners of Escambia County allot and furnish sufficient space to house the County Superintendent of Public Instruction and members of the Board of Public Instruction in a new courthouse or addition to the existing one, for which plans are presently being prepared?

To: Honorable Jack Greenhut, Attorney for the School Board, Escambia County, Pensacola, Florida:

You have advised that the County Superintendent and School Board presently occupy approximately 8,000 square feet in the Pensacola Vocational School, which is one of the facilities operated by the Public School system in Escambia County.

Section 230.29, F. S., 1951, is quoted as follows:

"The county superintendent shall have his office at the county seat. Office space shall be provided and heat and light furnished by the board of county commissioners; provided, however, that in the event such office space as above required is not provided by the commissioners, the county board may provide such space as is needed. The office shall be provided with furniture, equipment, telephone, supplies, and other essentials by the county board."

This section is a portion of the School Code of 1939 (Chapter 19355, Laws of Florida, 1939, Section 429).

The use of the word "shall" in the statute, on first impression seems to indicate an intent by the legislature that the Board of County Commissioners be mandatorily required to furnish office space to the School Board. The proviso, however, which grants to the County Board the authority to furnish its own office space

should it not be allotted by the Board of County Commissioners, casts doubt upon that interpretation.

The legislature is not prohibited from imposing mandatory duties on the Boards of County Commissioners (*Apgar v. Wilkinson et al*, 95 Fla. 457, 116 So. 78). In the *Apgar* case, *supra*, the court announced the general rule to be, "... where mandatory words or provisions are used in statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless something in the body of the act is indicative of the contrary view." It then construed the words in the legislative act, "required" and "shall", as a grant of power, discretionary in the Board of County Commissioners.

A main purpose for the erection and maintenance of a county courthouse is that county offices be centralized, so that the business of the county be handled efficiently, and with greatest convenience to the public. It is realized that funds available for the purpose of housing the various county officers may be limited to such an extent that it is a financial impossibility for the Board of County Commissioners to provide adequate space in a contemplated addition to the county courthouse or in a new structure. The legislature may, by use of the proviso in §230.29, F. S., 1951, have anticipated such a situation, thereby authorizing the County Board of Public Instruction to provide its office space, should the Board of County Commissioners be unable to so do.

Your question can best be answered by stating that, while ordinarily it is the duty of the Board of County Commissioners to furnish quarters for county officers, and also in the event of the contemplated construction of a new courthouse, and sufficient county funds are available, it is the County Commissioners' duty to provide adequately for the county school board's needs, but the Board of County Commissioners is not required under all circumstances where space or building funds are not available to furnish *adequate* office space for county officers, including the County School Board.

There are practical problems with which you will be faced. For example, it may be determined that sufficient *county funds* are not available for the construction of adequate office space to house the School Board and that it is impossible for the Board of County Commissioners to provide the quarters requested by the School Board. In that event, the School Board may wish to use its funds for its accommodation in the county courthouse. By reason of the Florida Constitution (Art. XII, §§9 and 13) all sums expended by the School Board must be for "school purposes." Should the School Board determine to so use its funds in the construction and erection of the county courthouse, some arrangement must be entered into, whereby it has exclusive title or permanent control over that portion of the building for which school funds are expended. It is not within the province of this opinion to suggest the method whereby the agreement may be consummated, but that is for the determination of the respective boards.

A spirit of cooperation must exist between the Board of County

Commissioners and the School Board to the extent that the former furnish reasonable quarters commensurate with available space or funds for the erection of the courthouse or additions thereto, and by the latter to adjust its demands so that that space not be disproportionate to the needs and quarters allotted to other county officers, housed in the county courthouse.

PERSONNEL OF SCHOOL SYSTEM

August 21, 1953.—053-212.

COUNTY SCHOOL BOARD—BINDING CONTRACTS— INSTRUCTIONAL STAFF MEMBERS—COMPENSATION

STATEMENT: "There are five members of the instructional staff involved and since the same ruling would apply to all of them, I will just state the case of one, X is a member of the instructional staff as supervisor and is under a continuing contract.

"On June 22, 1953, eight days before the end of the fiscal year, I recommended to the Board and they adopted a motion increasing the salaries of teachers (and it included this particular member) \$350.00 per year. This recommendation was made pursuant to the increase voted by the 1953 Legislature.

"On July 1, 1953, X commenced his 1953-54 school year under a continuing contract (Form L-CC). No notice was given prior to June 30th that his compensation would be any less than it was last year, or that any cut was anticipated, but on July 20th at a meeting of the Board of Public Instruction, a motion was made by one of the Board Members and passed by the Board to the effect that the Board cut the supplements twenty per cent of any member of the instructional staff who was making \$4500.00 or over per year as of June 30, 1953, with the exception of the Attendance Assistant, whose salary and mileage are figured together.

"X complains that if he had been notified prior to July 1st that he was to be re-employed, but his compensation was to be cut he would have had an opportunity to seek employment elsewhere.

"As you know, if we don't propose to rehire a member of the instructional staff, we have to give them a certain, definite notice prior to the end of the school year. Since X is under a continuing contract, he contends that, since he was not given notice that he was not to be re-employed under the same salary schedule as of the 1952-53 school year he is entitled to the same compensation that he received during that year, plus the \$350.00 raise given to all the other teachers, and that a cut in compensation, which affects only five members of the instructional staff in the entire county, is unfair and unjust."

QUESTION: Did the failure of the county school board to take action prior to July 1st bind said board by an implied contract to pay X at the same rate of compensation he received last year, plus the \$350.00 increase?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Section 231.36, F. S., provides in part: "Each person to whom a continuing contract has been issued. . . shall be entitled to continue in his position or in a similar position in the county at the salary schedule authorized by the county board. . ."

Section 231.37 provides: "Any person employed in instructional capacity shall receive the salary prescribed by the salary schedule adopted by the county board in compliance with the requirements of Chapter 230."

Section 230.23 (7) (e) provides, in part, the county board shall ". . . act not later than 4 weeks before the close of school during any year on the nomination of the county superintendent of all other members of the instructional staff. . . ."

Section 230.23 (7) (f) provides that the county board shall "adopt a salary schedule or salary schedules to be used as a basis for paying members of the instructional staff . . . fix and authorize the compensation of members of the instructional staff and other school employees on the basis of such schedules."

Section 230.23 (7) (g) provides that the county board shall "provide written contracts for all regular members of the instructional staff. All contracts with members of the instructional staff shall be in accordance with the salary schedule adopted by the county board. . . ."

Under the statutory provisions cited above, X would be entitled to receive the same compensation fixed by the board in its schedule for all other members of the instructional staff in his classification. Apparently this schedule was adopted on or prior to renewing of his continuing contract at the end of the school year. The increase in salary applicable to all members of the instructional staff including X was also adopted prior to the time of his reappointment under his continuing contract. The subsequent action of the board in changing the salary schedule and disallowing an increase to X or others in his salary bracket was apparently taken after X had renewed his contract for the ensuing year and would therefore appear to be a breach of the school board's implied offer of an increase to X along with other teachers.

It is therefore my opinion that your question should be answered in the affirmative.

TRANSPORTATION OF SCHOOL CHILDREN

November 3, 1954.—054-245.

SCHOOL BUS DRIVER—CONTRACTS—TRANSPORTATION OF PUBLIC AND PAROCHIAL SCHOOL CHILDREN

QUESTION: "May a contract school bus operator make an independent contract to transport children to parochial schools simultaneously with the transportation of children to public schools, the contract price to be paid by the parochial school or its patrons?"

To: Honorable Thomas D. Bailey, State Superintendent of Public Instruction, CAPITOL:

I find no prohibition contained in the statutes which makes it mandatory for a school board to contract for the exclusive services of a school bus driver and his equipment in providing transportation for the public school system, or which would render illegal a contract of this kind.

In other words, it would appear that if an independent contractor who operates a bus or busses, contracts with a county school board to transport school children, that there would be nothing illegal about his entering into a separate contract with a private school or any other individual company or agency for transportation services, so long as the two contracts do not interfere with the services agreed upon with any of the parties involved.

This opinion does not attempt to consider the wisdom or advisability of such a contract, since that is a matter which is properly left to the administrative discretion of the school board in determining whether or not the activities of the contractor, in furnishing transportation services to other parties, would interfere with the services which he had agreed to furnish to the school board.

Subject to the above observations, your question is answered in the affirmative.

THE SCHOOL PLANT

March 11, 1954.—054-60.

BOARD OF PUBLIC INSTRUCTION—SCHOOL BUILDINGS— SPECIFICATIONS—CONTRACTS—BIDS—\$235.31, F. S.

QUESTION: "Does a Board of Public Instruction have the authority to enter into contract for the erection of a school building with the low bidder, if the base bid price has been reduced by approximately twenty-five per cent through the alteration of specifications, deletions, revisions and other changes in order to bring the cost of the building within the financial ability of the board?"

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education, Tallahassee, Florida:

The general law on this subject is well stated in Volume 43, Am. Juris., page 789, par. 46, "Departure from terms of advertised plans and specifications modifying terms after bids are in . . . a contract let upon the basis of anything else than the advertised plans and specifications would be one let without the competitive bidding which is necessary to give it validity . . . It seems however, that readvertising for bids is not necessitated by a slight variance between the advertised specifications and proposed formal contract, or by reason of incidental changes therein," and on page 781 of the same volume, par. 49, "Necessity of Readvertisement: Private negotiations,—As already pointed out, any material departure from the advertised plans and specifications necessitates a new advertise-

ment giving all bidders equal opportunity of submitting bids upon the basis of the altered plans . . . The law does not permit private negotiations with an individual bidder, nor any change of plans and specifications submitted for the competition, nor variances for the purpose of obtaining a change in the bid of one or more bidders. The whole matter is to be conducted with as much fairness, certainty, publicity, and absolute impartiality as any proceeding requiring the exercise of quasi-judicial authority. Thus, if after advertising for and receiving stated proposals for the doing of public work for a municipality, none of the bids is found satisfactory, the common council has no authority to favor one of the bidders by negotiations with him privately, changing the scope of the work to be done or the terms of payment therefor in consideration of the reduction of his offer."

In my opinion, a change in the advertised specifications after the bids are received amounting to a reduction of 25 per cent in the base bid price would constitute a material change in the original plans and specifications. Your question is therefore answered in the negative.

FINANCE AND TAXATION; SCHOOLS

February 12, 1954.—054-31.

STATE FOUNDATION PROGRAM—INSTRUCTIONAL SALARIES—§236.04 (10) F. S. APPLICABLE

QUESTION: Does §236.04 (10), F. S., apply only to (1) Instructional Salaries, or does its application include as well (2) other current expense, (3) Capital Outlay?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education, CAPITOL:

The wording of §236.04 (10), F. S., clearly indicates that it is applicable only to instructional salaries.

Your question is answered accordingly.

FINANCIAL ACCOUNTS AND EXPENDITURES

May 20, 1954.—054-121.

INSURANCE—PLANS ACCEPTABLE—PUBLIC SCHOOL BUILDINGS

QUESTION: Do the insurance plans which are popularly known as Five-Year Premium Payment Plan, Annual Renewal Plan, Budget Plan, and Bank Plan comply with the requirement of §235.07, F. S., which uses the term "Staggered Five-Year Plan?"

To: Honorable Thomas D. Bailey, Superintendent of Public Instruction, CAPITOL:

Section 235.07, F. S., is as follows:

"The county board shall keep all school plants with four or

more classrooms insured against loss or damage by fire. School property in the county may be insured in such amount and with such kinds of insurance as will give proper protection; provided, that it shall be the duty of each county board, insofar as possible, to arrange insurance on a *staggered five-year plan*; and provided, also, that when necessary the county board shall have authority until July 1, 1952, to proceed in accordance with the provisions of §237.27, as amended, to negotiate a loan in order to adjust its insurance in accordance with the provisions of this section." (Emphasis supplied)

It is my understanding that this question has been presented after conferences between representatives of your office, the office of the Insurance Commissioner, the office of the State Auditor, the Insurance Department of the Barnett National Bank in Jacksonville, and of this office. One conclusion, among others concurred in by those attending these conferences, is reported to have been that the term "staggered five-year plan" had no technical meaning peculiar to the insurance business, that it should be interpreted in accordance with the commonly recognized meaning of the word "staggered" when used in this sense, and that any of the plans referred to in the question could be called staggered plans. In view of this conclusion which was based on certain studies and charts of the various plans made by some of the represented state agencies, and which was further based on the common knowledge of the insurance experts who attended, you have sought the official opinion of this office with respect to this question.

Taking into consideration the information elicited at the mentioned conferences, it appears that the four insurance plans named in the question are different methods of paying or financing five-year term policies of the type ordinarily employed for the insurance of public school property in this state. Each plan is similar in that payment of the premium for the five-year term coverage, at least insofar as the assured is concerned, is staggered, or arranged so that a percentage of the total cost of the insurance is paid in each of the five years. Although it may be said that each plan involves a staggered method of payment, only one of the plans, the Budget Plan, is staggered insofar as the insurance coverage itself is concerned.

Although there has been entertained in some quarters the assumption that the budget plan was the staggered plan intended by §235.07, F. S., there is no tenable basis for concluding that the other plans named in your question do not fulfill the requirements of the law with equal success. None of the insurance texts or services use the term "staggered plan" to describe any particular method of acquiring coverage of the type in question, and there is no reason for believing that the Legislature intended this provision to have such a technical meaning.

The section as a whole indicates that the only practical purpose of the requirement is to avoid an outlay of a disproportionate amount of money in one out of every five years. The fact that provision was made between 1949 and 1952 for the borrowing of the money necessary to put the insurance of the school properties on

the "staggered five-year plan," is evidence that in at least some of the counties there were insufficient funds available to pay even the comparatively small original payment on such a plan. That being the case the only valid reason for specifying a staggered plan was that the payments might be made over a five-year period, instead of during one year, so as to constitute less of a financial burden on the county.

Since each of the plans mentioned in your question incorporates a staggered plan for the payment of the cost of the insurance, it is my opinion that any of them satisfy the requirements of §235.07, F. S., as herein construed.

May 24, 1954.—054-122.

COUNTY BOARD—BORROWING POWER—INCLUSION OF
RACING COMMISSION FUNDS—§237.27 (2), F. S.

QUESTION: Does the language of §237.27 (2), F. S., permit the inclusion of Racing Commission funds in the receipts upon which the determination of borrowing power will be based and should such receipts properly be included for this purpose?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Section 237.27 (2), F. S., provides:

"(2) *Obligations may not exceed one-fourth of county or of district current revenue for the preceding year.*—No obligation, of the nature prescribed herein, may be incurred by any county board when such proposed obligations exceed one-fourth of the revenue derived during the preceding year from county current school funds or from the district current school funds of the district for which the obligation is incurred; provided, that if the obligation is for the purchase of school buses and if the county board can show to the satisfaction of the state board that the payments proposed to retire the obligation can be made from the amount available from state funds for transportation expense, obligations may then be authorized under this section in such an amount that the total maturities to be retired, during any year of the period for which the loan is approved, shall not exceed one-fourth of the revenues from the preceding year from the fund against which the obligations are incurred."

I find no general act of the Legislature which distinguishes between school funds derived from race track revenues and other sources.

There do exist, however, several special acts which designate the use to which race track revenue must be put by the school boards in the particular counties involved.

Your question is therefore answered in the affirmative except for certain counties whose race track school funds have been earmarked by special act of the Legislature. I do not believe that in

counties of the latter category the race track funds received by the county could properly be used in determining the borrowing capacity of the county under §237.27 (2), F. S.

RETIREMENT SYSTEM FOR SCHOOL TEACHERS

March 2, 1953.—053-47.

SCHOOLS—TEACHERS—APPLICATION FOR RETIREMENT—DATE OF FIRST BENEFIT CHECK— §238.07(3), F.S.

QUESTIONS: 1. Under the provisions of §238.07(3), F. S., may the Board of Trustees of the Teachers' Retirement System issue a member's first benefit check on the last day of the first full calendar month following the termination of his services provided his application for retirement is placed on file by the same date?

2. Under the provisions of §§238.01 (16 and 18) and 238.07 (3), when should a retiring member place his application on file in order to receive his first check on the last day of July if his services terminate in June?

To: *Honorable K. D. Farris, Executive Secretary, Teachers' Retirement System:*

Section 238.07 (3), F. S., provides, in part:

"... that any member in service may retire upon reaching the age of retirement formerly selected by him upon his written application to the board of trustees setting forth at what time, not less than thirty nor more than ninety days subsequent to the execution and filing of such application, it is his desire to retire, *notwithstanding that during such period of notification he may have separated from service. Upon receipt of such application for retirement the board of trustees shall retire such member within not less than thirty nor more than ninety days thereafter;...*" (Emphasis supplied)

As to your first question, it is my opinion that a teacher may file an application for retirement prior to the date on which he is to terminate his services. This written application must be filed with the board setting forth the date on which the teacher wishes to retire. The date he selects for his retirement must be at least thirty days after the filing of his application but not more than ninety days after said filing.

The board must act on said application within ninety days from the date of its receipt but cannot retire the teacher within less than thirty days from receipt of the application.

Section 238.01 (16 and 18) requires annuities and pensions to be paid in equal monthly installments and you advise that it is the policy of your board to issue all checks on the last day of the month.

In my opinion, therefore, a teacher could file his application on

the 1st day of June setting forth his intention to retire on the 1st day of July, but could continue to work through June and not terminate his services until the 30th day of June. Assuming that his application was in order, the board could approve it on the 1st day of July and the teacher's retirement would commence on that date. The teacher's first benefit check would be for the month of July and would be sent to him on July 31st.

I believe that the above answers both questions 1 and 2.

GENERAL PROVISIONS FOR INSTITUTIONS OF HIGHER LEARNING

January 25, 1954.—054-15.

BOARD OF CONTROL—FLORIDA A. & M. UNIVERSITY— SCHOLARSHIPS

QUESTIONS: 1. Are the county boards of public instruction scholarships, authorized by §239.02, F. S. applicable to Florida Agricultural and Mechanical University?

2. What tuition or other Florida A. & M. University charges are waived by §239.02, F. S. in favor of students selected for scholarships by county boards of public instruction?

To: Board of Control, Florida State University:

Your letter states that a student has been selected by a county board of public instruction for scholarship at Florida Agricultural and Mechanical University under §239.02.

You mention the following charges at the Florida A. & M. University: Registration \$11.50, Health Fee \$8.00, Athletic Privileges \$5.00, and Entertainment Privileges \$5.50; and you ask whether any of those charges are waived by the scholarship.

Authority to charge tuition is contained in §239.02, but tuition, by that name, has not been a charge at any of the state institutions of higher learning.

After authorizing the county scholarship, the same §239.02, provides:

" . . . and such students so selected shall be received into said respective institutions and entitled to receive the benefits of a full course of instruction at either said college or university, or normal department, or other institution aforesaid, without any charge for instruction, but subject to such rules and regulations as may be established by the said board for the governance and direction of the same; . . ."

At the time §239.02 was originally enacted, in the Buckman Act of 1905, it referred to the institutions named in the preceding §239.01. The latter section originally was §12 of that Act. Until 1947, the last mentioned section specifically named University of Florida and the Florida Female College, the latter now Florida

State University, and did not include, by name or implication, the Florida Agricultural and Mechanical College for Negroes. The Buckman Act provided for a Normal Department at the University of Florida and the Florida Female College. At that time there was no Florida A. & M. College, but the Buckman Act recognized a previously existing Colored Normal School, in Tallahassee, as a school for the training of colored teachers, and put it under the management of the Board of Control. Its teaching faculty consisted of: "a principal and two assistant instructors". It was not then regarded as an institution of higher learning. In 1909 the Legislature gave it the name Florida Agricultural and Mechanical College for Negroes, but made no further changes in its organization or program.

In 1947, there was a partial revision of the statutes relating to the institutions of higher learning. In the meantime, Florida A. & M. grew rapidly and had actually become an institution of higher learning, although there was little, if any, statutory recognition of its college status other than its name and perhaps the necessary implications of biennial appropriations. §1 of Ch. 23669, Laws of 1947, greatly expanded §239.01 and specifically named the Florida Agricultural and Mechanical College as a part of the State's institutions of higher learning. At the same session, 1947, the Legislature revised other sections of Chapter 239, Florida Statutes, including scholarship matters at the institutions of higher learning, and specifically named therein the Florida Agricultural and Mechanical College, whereas that institution had not been named therein prior to 1947.

The foregoing circumstances, together with the known fact that the Legislature was then very conscious of its obligation to provide equal privileges and facilities for negro and white students, are, in my opinion, convincing evidence that the Legislature, in 1947, knew and intended that the words "said college and university" and "said institutions and normal", in §239.02, did, and should, include the Florida Agricultural and Mechanical College, specifically named in the 1947 amendment of §239.01.

Accordingly, it is my opinion that the scholarship provision of §239.02 is applicable to the Florida Agricultural and Mechanical University.

A scholarship provided by §239.02 waives only tuition for instruction. So far as I know, the Agricultural and Mechanical University makes no specific charge for instruction of any student. However, the item of \$11.50 for Registration fee, according to my information, goes into a fund from which instructional salaries are paid, and it is my opinion that the scholarship waives that item of cost. The other items: health service fees, athletic privileges, and entertainment privileges, are in no sense instructional costs or tuition for instruction, and they are not waived.

April 9, 1954.—054-80.

BOARD OF CONTROL—SCHOLARSHIPS—TEACHER
TRAINING—ELIGIBILITY

QUESTION: May a student holding a scholarship for teacher

training under §239.42, F. S., be certified to receive his degree in a school or division of the University other than in education?

To: Board of Control, Florida State University:

The statute provides:

"... to be eligible to continue to participate in scholarship funds each person receiving a scholarship shall: (1) be a bona fide student in the school, college or department of education and have his course or program approved by the head of such school, college, or department of education in accordance with the regulations prescribed by the state board of education for teacher education and certification, and (2) complete to the satisfaction of the institution the work he is undertaking each year."

Under that statute he is eligible if his course is approved by the head of the school of education in accordance with the State Board regulations for teacher education and certification. The statute does not require that he work toward a degree in education. His degree may be in any other school or division of the University.

In 1944, my predecessor considered the same question under a similar statute, Opinion #044-277, a copy of which is enclosed herewith.

BOARD OF CONTROL

March 3, 1954.—054-54.

BOARD OF CONTROL—MEDICAL STUDENTS—RESIDENCE REQUIREMENTS—§242.64, F. S.

QUESTION: Are the resident requirements of paragraph 3, §242.62, F. S., satisfied by an applicant for enrollment in the University of Miami School of Medicine under these circumstances: The applicant is a minor. His parents were residents of Florida when they were divorced in 1939. The mother was given custody of the applicant, and the father was ordered to support the applicant. When the divorce was granted the mother moved to another state taking the applicant with her, and still resides there. The father remained in Florida where he still resides, and where he is in business. The greater part of the applicant's maintenance cost has been supplied by the father. In 1951 applicant was admitted to the University of Florida as a resident student?

To: Board of Control, Florida State University, Tallahassee, Florida:

In answering the question, I assume that the applicant and his parents resided in Florida at least seven years prior to the divorce, and I also assume that the mother's custody of the applicant was unrestricted.

In Opinion 053-329, addressed to Dr. Marsh, Acting Dean of the University of Miami School of Medicine, I held that the intention of the Legislature was to require only an aggregate of seven

years residence and that the seven years were not necessarily consecutive, but the statute required that the applicant be a bona fide resident of the State at the time of his application.

When parents are divorced the legal residence of a minor child is that of the parent to whom custody of the child is awarded. That is the general rule and I find nothing in your statement regarding this application which would warrant a different rule. The fact that he may have been erroneously admitted to the University of Florida in 1951 as a resident of the State would not affect the question. It is my opinion that the facts stated by you do not show either the applicant or his mother to be bona fide residents of the State at the time of the student's application, but on the contrary both continue to be residents of the State to which they removed after the divorce in 1939.

February 15, 1954.—054-34.

**BOARD OF CONTROL—BUILDER'S RISK INSURANCE—
LOSS PAYABLE CLAUSE—§§255.01, 255.03, F. S.
APPLICABLE**

QUESTION: Where the Board of Control has entered into a contract for the construction of a building and purchases Builder's Risk policy, to whom and how should the loss be made payable? The form of contract used is the Standard Form of the American Institute of Architects, 6th edition.

To: Board of Control, Florida State University:

Article 29 of the construction contract requires your Board, as Owner, to effect and maintain fire insurance upon the entire structure, etc., with loss payable to your Board, as Trustee for yourself and the Contractor, and all subcontractors, as their interest may appear. The Contract also requires you as Owner to effect and maintain, at Contractor's expense, such other special coverages as the Contractor may demand.

Sections 255.01 to 255.03 provide for the use and deposit of the proceeds of insurance policies on any of the buildings under your management or control. That is, they provide that the proceeds of such policies shall be deposited in the state treasury as a fund to be used exclusively for repairing, rebuilding, or replacing the destroyed or damaged property, and authorize the use of such proceeds for those purposes. There is no conflict between the statutes and the terms of the construction contract which you use.

The Builder's Risk policy should be made payable to:

"Board of Control, a public corporation of the State of Florida, as Trustee for itself and for _____, Contractor, and all subcontractors, as their interests may appear."

If there should be more than one Contractor, name each.

January 28, 1954.—054-18.

UNIVERSITY TEACHING STAFF—LABORATORY HAZARDS
—STUDENTS—INJURIES—LIABILITY

QUESTIONS: 1. Are members of the teaching staff, department heads or others who may be responsible for the conduct of chemical or other laboratory work, liable in the event a student is injured in performing such laboratory work or while exposed to its hazards?

2. May the state provide liability insurance for such instructional or other staff members?

To: Board of Control, Florida State University:

In general, an instructor is not liable for injury to his students except where the injury is due to the instructor's negligence. On the other hand, the instructor is liable, like anyone else, when, due to his negligence, someone is injured. In 78 C. J. S. 1197, the general rule is briefly stated thus:

"A teacher in the public schools is liable for injury to pupils in his charge caused by his negligence or failure to exercise reasonable care."

In the absence of authorizing statute, state funds may not be used to pay insurance premiums on non-existent state liability. At the same time, it must not be overlooked that means to supply and provide the requirements for best practices in the matter of safety of the student personnel should be made available by the University. The instructors and other responsible staff members have the duty to learn and to enforce the customary and best safety practices. Enforcement of such practices will relieve them from personal liability.

In so far as the only liability would arise from the instructor's own negligence, the question might be raised as to why anyone other than the instructor should pay premiums for his personal coverage. It may be that characteristic youthful indifference to dangers might make it very difficult to enforce rigid safety measures, when dealing with students, and if your board should find that personal coverage is deemed necessary by the great majority of those engaged in such work, not only in your own but also in other comparable institutions, your board could, as a matter of policy, make an appropriate adjustment of salary. It may be that a plan could be developed to insure the student engaged in hazardous laboratory work against accidents he might suffer, a premium for his coverage to be provided from the laboratory fee he pays. I believe the possibilities of such a program might be worth exploring.

September 23, 1953.—053-250.

BOARD OF CONTROL—COLLATERAL SECURITY
FOR BANK DEPOSITS

QUESTION: When the Board of Control, or institutions under its management, deposit the funds listed in §2 of Ch. 28315,

Laws of 1953, §240.092 F. S., in private banks, may the Board require that the collateral to secure such deposits be pledged to the State Treasurer?

To: Board of Control:

Chapter 28315 of the Laws of 1953 requires that funds received by the institutions under the management of the Board of Control be deposited in the State Treasury, except ten different funds listed in §2 of that Chapter.

Heretofore, when such funds received by these institutions were deposited in private banks, the Board of Control required the banks to pledge collateral with and to the Board of Control for the protection of the bank deposits.

It is clear in Ch. 28133 of the Laws of 1953 that it is the legislative policy that state funds be deposited in the state treasury. The listed exemptions in §2 of Ch. 28315 represent various kinds of funds, some of which will never become state money, such as money of students in student banks or otherwise in safe-keeping, alumni funds, etc.; the list includes other exempted funds which, in whole or in part, will or may ultimately become state funds. In any event, the state is accountable for all of these funds which it undertakes to receive and administer, whether for the benefit of the state, or the institution, the student or faculty personnel.

Another thing contemplated by Ch. 28133 was that all state funds which might be temporarily deposited in a private bank for clearance, or in an authorized revolving fund of a state agency, should be secured by collateral. Referring to such collateral, §1 of the last named chapter contains the provision: "Said collateral security shall be deposited with, or pledged to, the State Treasurer in the same manner as set out in Section 18.11, Florida Statutes."

It is my opinion that the collateral required to secure the exempted funds listed in §2 of Ch. 28315 may and should be pledged to the State Treasurer, and that he is authorized to receive and hold the same as security for such deposits.

August 16, 1953.—053-210.

**BOARD OF CONTROL—FUNDS—TEMPORARY DEPOSITS
IN PRIVATE BANKS—TRANSFERS—CH. 28315, Acts 1953**

QUESTIONS: 1. May the Universities deposit the funds or collections which are the subject of Ch. 28315, Laws of 1953, including the specific funds exempted from the restrictions of the Chapter, in a single bank account for clearance purposes?

2. If your answer to the above is in the affirmative, may the Board of Control draw checks against this account payable to its order for deposit in a local bank to accomplish the transfer of the exempted funds which have been deposited in the clearance account?

To: Board of Control, Florida State University:

Section 3 of Ch. 28315, Laws of 1953, provides that funds received by the institutions of higher learning, or by the Board of

Control on their behalf, may not be maintained in any bank subject to disbursement from such bank account, but it authorized the establishment of an account in a bank for the safe-keeping of the funds contemplated by the Act prior to transmittal to the State Treasurer.

Section 2 of this Chapter provides for the exemption of certain "auxiliary" or "agency" funds from the provisions of this Act. These auxiliary or agency funds are non-state funds, such as students' money, Alumni funds, etc.

Section 4 of this Chapter states that no money may be withdrawn from any such temporary account authorized by §3 of this Act, except by check, draft, warrant or other order payable to the State Treasurer for deposit in the State Treasury.

The Universities collect large sums of money during registration and other periods and, in order to properly safeguard this money, have been depositing collections daily into clearance accounts established in local banks. These sums of money represent collections of funds covered by this Act, including funds exempted in §2, and they are usually lump sum collections representing both kinds, that is, funds which must go into the State Treasury and exempted funds. It is impractical to make distributions between State funds and exempted funds immediately upon collection, and it would be very dangerous to keep large sums of money on hand. These daily collections sometimes amount to more than \$200,000.

The practical treatment of collections is to deposit them intact daily into a single clearance account and then to periodically analyze such collections and make proper distribution of State funds to the State Treasurer, and the non-state or exempted funds into private account.

There is no legal objection to the deposit of the funds described in your first question in a single clearance account.

The purpose of the Act was to require all State money collected by the institutions of higher learning, as distinguished from non-state funds listed in §2 of the Act, to be deposited in the State Treasury before they could be expended in payment of any obligation of the State.

The language of Sections 3 and 4 of the Act is positive and, taken literally, seems to permit no exception, but I do not think it was intended to cover such a circumstance as you have set out. I am of the opinion that the drawing of a check on the authorized temporary clearance account in order to remove from that bank account the exempted auxiliary and agency funds deposited therein was not what the legislature intended to prohibit. They intended to forbid the payment of any State obligation directly from that account,—they did not intend to prohibit transfer by check or otherwise of nonstate funds to a private bank account.

It is my opinion that check on the clearance account covering only the auxiliary and agency funds deposited therein and exempted by the Act, payable to the Board of Control for deposit in a private bank, would not violate the statute.

July 30, 1953.—053-176.

**SMALL DORMITORY HOUSING PROJECT—FUTURE BOARD
OF CONTROL—FRATERNITY HOUSE ON OFF-
CAMPUS LOTS—METHOD OF FINANCING**

QUESTION: In any future small dormitory housing program financed by revenue certificates in which the living group has the privilege of purchasing the building, such as the recently authorized ten small dormitories project, may any of the houses be constructed on off-campus lots?

To: Board of Control, Florida State University:

One of the fraternities at the University of Florida owns lots on West University Avenue in Gainesville, between two present fraternity houses. They also own a lot in the fraternity area on the campus. They prefer to build on the off-campus lots, and are willing to convey the lots to the State Board of Education to enable them to participate in a future small dormitory housing program financed in the same manner as the ten small dormitories project recently authorized.

It is not necessary that the house be constructed on the campus proper but the title to the property must be in the State Board of Education. It is also required that use of the property be restricted permanently and exclusively to University-approved housing and subject to such restrictions, limitations, regulations, etc., as your Board has established for the campus fraternity and sorority areas, and as set out in the form of Deed approved for that purpose by the State Board of Education.

The question may involve a determination of long-range policy in that respect; and as a practical matter it is to be remembered that under federal agency financing that agency's approval of the site is required.

October 28, 1953.—053-296.

**BOARD OF CONTROL—UTILITY INSTALLATIONS—
ENGINEERS' FEES—SINGLE CONTRACTS**

QUESTION: May the Board of Control enter into a single contract with a firm of engineers for the planning, designing, and other engineering services in connection with utilities for three separate buildings to be constructed with funds from three separate appropriations, prorating the total engineering cost among the three appropriations?

To: Board of Control:

The Legislature appropriated \$2,100,000 for a Library, \$850,000 for a Home Economics Building, and \$750,000 for a General Classroom Building, at Florida State University. It is believed that, by employing one firm of engineers for necessary engineering services for each building, a better plan and design for installation of utilities can be had, as well as a saving in the overall cost for engineering services.

I am of the opinion that your Board may enter into such a contract.

July 13, 1954.—054-167.

**RINGLING MUSEUM—LIABILITY INSURANCE—IMMUNITY
OF STATE AGENCY**

QUESTION: May the Board of Control purchase insurance for the Ringling Museum against bodily injury and property damage liability?

To: Board of Control, F. S. U.:

Your board, as a state agency, enjoys immunity from tort liability in connection with your governmental functions. On the other hand, the museum makes a charge for admission, thus acquiring a substantial part of its maintenance and operating cost, and, at least to that extent, the operation of the museum is a proprietary rather than a governmental function. Under such circumstances, immunity would be very doubtful. (See *Suwannee County Hospital Corp. vs. Golden*, 56 So. 2d 911.)

It is my opinion that your board may lawfully purchase the insurance.

**SALARIES; MISCELLANEOUS EDUCATIONAL LAWS;
APPROPRIATIONS**

May 7, 1954.—054-113.

**BOARD OF CONTROL—MIAMI UNIVERSITY MEDICAL
SCHOOL—USE OF STATE FUNDS—§242.62(5), F. S.**

QUESTION: Is it the duty of the Board of Control to audit the records of the institution receiving state medical school funds to determine whether the institution has expended those funds for the specific and limited purposes set out in §242.62(5) of F. S.

To: Board of Control, Florida State University:

Section 242.62(5), referring to the first accredited and approved medical school established in the State of Florida and the funds appropriated for it, reads:

"Such institution is herewith and hereby prohibited from expending any of said sums received under the terms of this section for any purposes whatsoever, except the operation and maintenance of a medical school and for medical research. Said institution is further prohibited from expending any sums received under the terms of this section for the construction or erection of any buildings of any kind, nature or description, or for the maintenance and operation of any hospital in any form or manner whatsoever."

Chapter 26763, Laws of 1951, of which §242.62 is a part, imposes certain duties on the Board of Control relating to the determination of the amount of state funds to which the medical school may be entitled, and the recoupment for the state by the Board of Control of certain amounts paid on behalf of any medical

student who resigns or is dismissed before completion of his school year.

While there is nothing in the chapter which specifically requires or authorizes the Board of Control to audit the medical school's use of the appropriated funds, I think the duty is implied and that, therefore, the Board of Control has the duty of performing that service in connection with these funds.

December 11, 1953.—053-329.

UNIVERSITY OF MIAMI MEDICAL SCHOOL—STUDENTS— RESIDENCE REQUIREMENTS

QUESTIONS: 1. Shall the restriction “. . . and his or her parents or legal guardian. . .” apply to the applicant who has resided in Florida for more than seven years after attaining his majority rights although his parents may have never lived in Florida?

2. Shall “. . . seven years prior to his or her acceptance . . .” be interpreted as seven years immediately prior to acceptance, and shall the seven years be of uninterrupted residence?

3. Our students are “accepted” by an admissions board of the medical school. Am I to suppose that they are “approved” by the State Board of Control and, if so, shall they be seven year residents prior to the “acceptance” date or prior to the “approved” date? There will be several months difference between the two dates.

4. Shall an applicant whose parents are separated or divorced, (who lives with the parent in Florida), and whose support comes from a parent nonresident in Florida, be considered as a resident for admission purposes?

5. Shall an applicant who, with his mother, has lived outside Florida until recently when his mother married a long-time resident of Florida be considered as a resident for admission purposes?

6. Am I correct in assuming that an individual's residence is not forfeited during an educational period or during a tour of military duty even if these take him outside Florida for some years?

7. May more than fifteen bona fide residents from a single county be admitted to any first-year medical class if no claim for the state subsidy is made for the number in excess of fifteen?

To: *Dr. Homer F. Marsh, Ph.D., Acting Dean, School of Medicine, University of Miami, Coral Gables, Florida:*

Your first six questions relate to that part of §242.62(3), F. S., reading as follows:

“ . . . provided said medical student and his or her parents or legal guardian have been bona fide residents of the State of Florida for seven years prior to the date of his or her acceptance and approval as a medical student. . . ”

Your seventh question is concerned with §242.62(4), which reads as follows:

"For the purpose of ensuring enrollment to medical students from all parts of the State of Florida in said medical institution, such institution is herewith and hereby prohibited from enrolling or admitting in any first-year medical class more than fifteen Florida residents, as above defined, from any single county in this state."

Before discussing your questions, I wish to point out that whether a person has legal "residence" in a state is sometimes difficult to determine with accuracy because it includes a determination of what is in the mind of the person involved, that is, his actual intention in regard to his residence or home or domicile. Even that is sometimes complicated by the fact that certain persons are actually uncertain about their own intentions as to home and residence. A person's statement, as to his residence and his intentions in that respect, is important if he is telling the truth. Residence, in the legal sense of the word, is established or proven by certain indicia which in general are those acts and that conduct which, according to human experience, are associated with one's residence in a community, or which usually accompany a change of residence from one locality to another. Some of these are: the purchase of a home; the renting of a home; the purchase of other property in the locality claimed as residence; going into business or accepting permanent employment; affiliation with churches, clubs, civic groups, or other organizations in his locality; the payment of taxes on personal property, or other property; registering and voting; his future plans; admissions, declarations, or other statements, orally or in documents, which might indicate present and future intentions as to residence; to what extent he may have severed his connections or interest in persons, property or activities, at his former legal residence. None of these things are necessarily controlling, and some have more weight than others, depending on all of the facts in each particular case.

It is also to be borne in mind that the legal residence of a minor is the residence of his parents or parent. There are exceptions to that in certain cases. If the parents are separated or divorced, legal residence of the minor is usually that of the parent who has lawful custody of the minor. Again, there are exceptions to the rule.

The final determination of the question of residence, under §242.62, is the duty of the Board of Control. There will be comparatively few cases of difficulty, but when there is doubt, full, complete and detailed information about the applicant should be obtained and supplied to the Board of Control.

1. Answering your first question, the words "and his or her parents or legal guardian", in §242.62, do not apply to the applicant described in your first question.
2. The words "seven years prior to his or her acceptance", in §242.62, are ambiguous and there is nothing in the act which clearly discloses whether the Legislature intended the seven years to be (a) the seven years next preceding the applicant's acceptance, or (b) any seven years prior to acceptance, or (c) whether the seven years should be consecutive. I think it most likely that

the Legislature intended to require only an aggregate of any seven years of bona fide residence in the state, not necessarily consecutive, provided the student was a bona fide resident at the time of his application.

3. Your next question is concerned with the date from which the seven years residence is computed. The statute in that respect reads "for seven years prior to the date of his or her acceptance and approval as a medical student." Ordinarily, that would be construed to mean both acceptance and approval, whichever should be later, but I do not think the Legislature actually so intended in this case, because the time of acceptance by your school and the approval by the Board of Control would not be uniform as to all students and could easily result in confusion. The applicant could not know, with sufficient assurance, the date on which your institution or the Board of Control might act. The circumstances require a definite date for all persons concerned. The state subsidy begins to accrue only with the actual enrollment as a medical student and it is my opinion that the latest date scheduled for enrollment as a medical student is the day from which the seven years is to be computed.
4. The answer to the fourth question would depend upon all of the facts, including the question of which parent has the custody of the applicant, if he is a minor. The mere fact that support comes from a nonresident parent does not necessarily exclude legal residence in Florida, but other facts and circumstances might exclude him. All details would be necessary in a case of this kind.
5. The fifth question requires a negative answer.
6. Answering your sixth question, legal residence is not ordinarily forfeited during an absence for educational purposes or during a tour of military duty outside of the state. However, there may be other circumstances accompanying the absence for educational purposes or military duty which would interrupt legal residence in this state. You have already had one such case.
7. In providing for the maximum number of medical students to be enrolled from any one county, the statute forbids the enrolling "in any first year medical class more than fifteen Florida residents, as above defined, from any single county in this state." The words "as above defined" means an applicant who has resided in Florida for seven years, and therefore the limitation would not apply to nonresidents or to applicants with less than seven years residence. Obviously, the Legislature did not intend to prohibit admission of applicants with seven years of bona fide residence in favor of non-residents or applicants who do not have the required seven years residence. The maximum of fifteen students from any one county limits the subsidy to be paid by the state and does not prohibit the enrollment

of additional students from the same county for whom your institution receives no subsidy, provided the admission of students from any county in excess of fifteen does not result in excluding qualified applicants from other counties which have less than fifteen.

STATE ANATOMICAL BOARD

October 27, 1953.—053-290.

ANATOMICAL BOARD—LOAN OF CADAVER TO UNIVERSITY OF FLORIDA FOR USE IN SCHOOL OF NURSING—LEGALITY

QUESTION: Is it lawful for the Anatomical Board of the State of Florida to loan or furnish Florida State University a cadaver to be used in the School of Nursing of said university?

To: *Honorable R. T. Hill, Executive Secretary, Anatomical Board of the State of Florida, University of Miami, Coral Gables, Florida:*

Chapter 28163, Acts of 1953, created the Anatomical Board of the State of Florida and invested in said board certain powers, among which is the authority to receive and distribute dead human bodies under procedures prescribed by the chapter. §11 of the chapter provides as follows:

"The Board or its duly authorized agent shall take and receive the bodies delivered to them under the provisions of this act and shall distribute them, proportionately and equitably to and among the 'medical and dental schools' and to those 'teaching hospitals' wherein the resident training program requires cadaveric material for study or the same may be loaned for examination or study purposes to recognized associations of licensed embalmers or funeral directors, or medical or dental examining boards at the discretion of the Board." (Emphasis supplied.)

In view of the foregoing, it is my opinion that the intent of the Legislature was to confine the term "teaching hospitals" to those hospitals where medical or dental students intern or take training. I do not think there was any intent to include schools of nursing, although a hospital having a school of nursing would be a "teaching hospital." Universities are not hospitals and therefore would not be embraced in the term or come under the act, unless such universities have either a medical or dental school.

August 10, 1953.—053-195.

UNIVERSITY OF MIAMI—TRANSFER OF DEAD BODIES TO ANATOMICAL BOARD—CH. 245, F. S., 1953

QUESTIONS: 1. The University of Miami has on hand several bodies which were obtained under Ch. 26798, Acts of 1951. Can the University of Miami legally transfer these bodies to the Anatomical Board created by Ch. 28163, Acts of 1953?

2. The Anatomical Board created by Ch. 28163, Acts of 1953, is presently without funds to operate, therefore, can the Board receive funds from the University of Miami to establish a current operating budget for the Board?

3. What type of bond should be made by the institutions receiving cadavers?

4. Can Dr. Wilson Sowder, member of the Anatomical Board, by virtue of being secretary to the State Board of Health, designate Dr. T. E. Cato, Health Commissioner of the Department of Health of Dade County, to represent him on the Board?

5. Should any special form or procedure be established for the Board to follow in obtaining and distributing dead human bodies?

6. Should the Board have stationery that carries the imprint of the State Seal or may it use relatively simply printed stationery?

7. Can the Miami branch of the Attorney General's office furnish the information and legal assistance needed from time to time or should the Board contact the Attorney General direct?

To: Honorable R. T. Hill, Executive Secretary, Anatomical Board of the State of Florida, University of Miami:

In reply to your first question, it is my opinion that the dead human bodies acquired by the University of Miami under Ch. 26798, Acts of 1951, may be transferred to the Anatomical Board of the State of Florida created by Ch. 28163, Acts of 1953. The laws are not in conflict as §18 of Ch. 28163, Acts of 1953, repealed any law in conflict with said chapter.

Replying to your second question, I call your attention to §§12 and 15 of Ch. 28163, Acts of 1953, which provide as follows:

"Section 12. The Board is empowered to prescribe a schedule of fees to be collected from the institution or association to which the bodies, as described in this act, are distributed or loaned to defray the costs of obtaining and preparing such bodies."

"Section 15. *The Board is hereby empowered to receive money from public or private sources in addition to the fees collected from the institution or association to which the bodies are distributed to be used to defray the costs of embalming, handling, shipping, storage, cremation and other costs relating to the obtaining and use of such bodies as described in this act; the Board is empowered to pay the reasonable expenses incurred by any person delivering the bodies as described in this act to the Board and is further empowered to enter into contracts and perform such other acts as are necessary to the proper performance of its duties; . . .*" (Emphasis supplied.)

Accordingly, your second question is answered in the affirmative.

Replying to Question Three, your attention is directed to §13 of Ch. 28163, Acts of 1953, which provides that no university,

school, college, teaching hospital or association shall be allowed or permitted to receive any dead human bodies until a bond in the penal sum of \$1,000 shall be given and such bond shall be conditioned that all such bodies received by such university, school, college teaching hospital or association shall be used for no other purpose than the promotion of medical science within the state. The bond should be given to the Board and it is my opinion that the bond should be written by a reliable surety company, qualified and licensed to do business in Florida.

In reply to Question Four, it is my opinion that inasmuch as Dr. Sowder, as secretary to the State Board of Health, is a member of the Anatomical Board the law does not provide for a delegation of that membership or authority by him to anyone else.

In reply to Question Five, I wish to recommend that the Board set up a procedure to be followed in obtaining and distributing dead human bodies in keeping with the provisions of Ch. 28163. Section 4 of the act authorizes the Board to make rules and regulations that are necessary for the performance of its duties.

In answer to Question Six, I wish to advise that it is not necessary that the stationery of the Board have the State Seal imprinted thereon.

Replying to Question Seven, I would be glad to have you call on the assistant attorneys general in my office in Miami any time that they can be of help to you. However, any request for official opinions should be directed to the Attorney General's office in Tallahassee.

STATE BOARD OF EDUCATION

September 28, 1953.—053-255.

STATE BOARD OF ADMINISTRATION AS AGENT— SCHOOL CAPITAL OUTLAY AMENDMENT BONDS— METHOD OF DEPOSITING

QUESTIONS: 1. If the State Board of Education decides to put into effect any part of Ch. 28065, General Laws 1953, (Senate Bill No. 135) such as the designation of the State Board of Administration to act as its agent in servicing School Capital Outlay Amendment Bonds, will such action make it mandatory to implement and put into effect any other provisions of this law, particularly the provisions of §4 relating to the handling of the proceeds of bond issues?

2. If the provisions of §4 are put into effect, will it be proper to disburse the funds set up in each prescribed construction or project account in a lump sum amount when requisitioned by the county, or must such funds be maintained in construction or projects accounts in the State Treasury and separate payments of each item of cost of projects as they progress toward completion be made therefrom as detailed vouchers are submitted by county school authorities?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education, CAPITOL:

Said Ch. 28065 is primarily designed to accomplish two purposes, viz., (1) authorize the State Board of Education to request the State Board of Administration to assist it as its fiscal agent in the issuance and service of the bonds and certificates authorized by §18, Art. XII of the State Constitution, and (2) enable the State Board of Administration to act as such fiscal agent if requested.

The extent to which such fiscal agent shall aid the State Board of Education being permissive, it is within the sound discretion of the Board. In this connection, it is expressly provided in §1 of Ch. 28065 as follows:

"In aid of the provisions of §18, Art. XII of the State Constitution, the state board of administration may, upon request of the state board of education, act as fiscal agent for the state board of education in the issuance and sale of any or all bonds or motor vehicle tax anticipation certificates, including any refunding of bonds, certificates or interest coupons thereon which may be issued pursuant to the provisions of §18, Art. XII of the State Constitution and upon request of the state board of education the state board of administration may take over the management, control, bond trusteeship, administration, custody and payment of any or all debt service or other funds or assets now or hereafter available for any bonds or certificates issued for the purpose of obtaining funds for the use of any county board of public instruction or to pay, fund or refund any bonds or certificates theretofore issued for such purposes under the provisions of §18, Art. XII of the State Constitution. The state board of education may from time to time provide by its duly adopted resolution or resolutions the duties said fiscal agent shall perform as authorized by this act and such duties may be changed, modified or repealed by subsequent resolution or resolutions as the state board of education may deem appropriate, provided, however, that such changes shall only affect the duties of the state board of administration as fiscal agent and shall in no wise affect or modify the paramount constitutional authority of the state board of education under §18 of Art. XII of the State Constitution, nor affect, modify or impair the contract rights of persons holding or owning said obligations authorized to be issued pursuant to said §18 of Art. XII."

What has been said with reference to the provisions relative to the fiscal agent applies with equal force to other provisions of the Act, including §4. Section 4, when read in reference to the title of the Act, is a permissive method of depositing and disbursing the proceeds derived from the bond issues. Whether it is used or not lies within the discretion of the State Board of Education. Furthermore, the use of the method outlined in §4 is in nowise made contingent upon a prior request of the State Board

of Education for the State Board of Administration to act as its fiscal agent.

It follows that question 1 is answered in the negative and question 2 is answered to the effect that it lies within the sound discretion of the State Board of Education to entirely disregard §4 or, on the other hand, to adopt it. It follows that the State Board of Education may use either of the methods of disbursement set forth in question 2 or some other alternate method within its sound discretion.

CHAPTER XVI

MILITARY CODE AND RELATED MATTERS

MILITARY CODE

August 11, 1954.—054-197.

PROPERTY—ARMORIES—INJURIES—LIABILITY

QUESTION: Where an armory is rented to private individuals for a particular function and some person attending that function is injured within the building, what liability would be incurred and by whom?

To: General Mark W. Lance, Adjutant General, State Arsenal, St. Augustine, Florida:

Forthwith are the duties of the armory board of the State of Florida:

Section 250.40, F. S.

"(1) . . . This board is charged with the supervision and control of all military buildings and real property within the state applied to military uses."

"(4) It shall be the duty of the armory board to consider and approve the plans for or of all armories . . . before such buildings shall be rented, constructed or otherwise acquired for military uses by the State."

"(8) Counties and municipalities are also authorized to grant to the state armory board, for military uses, by deed or long-term leases, property that may have been acquired, or buildings that may have been constructed by them, for uses as armories and rifle ranges."

"(9) Whenever it may become necessary in the public interest to acquire property . . . for armories . . . and the same can not be acquired by agreement satisfactory to the armory board . . . (it) is hereby authorized and empowered to exercise the right of eminent domain . . ."

It would appear from the above that the so-called "landlord" of an armory would be the state armory board. When reading §250.41, F. S., in light of the above, even though some doubt may be raised by subsection (1) which states:

"The term 'armory' as used in this chapter, shall be understood to mean a building used primarily for the housing and training of troops, and no building will be used for those purposes . . . that is not under full control and supervision of the properly constituted military authorities."

this doubt seems to resolve itself by subsection (2) which states:
"The armory board shall also constitute a board for the

general management and control of all armories when established, and may adopt and prescribe rules for their government and management."

The "full control and supervision" by the proper military authorities now seems to apply to the housing of soldiers and storing of military materials.

Assuming now that the armory board has the power to delegate its duties to so-called "agents", Post Commanders, and these Post Commanders are not exceeding their authority to rent out the armories to private individuals for short periods of time (and in as much as this seems to be a popular usage and the money received is accountable to the board and is used in the general upkeep of the armory itself, the Post Commander would not be exceeding his authority) the liability, if there is one, for injury received by a party in the building during this time, would fall upon the "landlord" or the armory board.

Any suit against a state board is against the state itself and therefore before such a suit may be maintained there must be a general law allowing the particular action. (Florida Consti., Art. III, §22.) I know of no such statute which authorizes the state armory board and the state to be sued because of an injury incurred in an armory. However, if the state armory board is authorized and has purchased liability insurance for a particular armory in accordance with the law authorizing the securing of such coverage, a party injured in such a way as to come within the terms of the coverage given by the policy so purchased would be entitled to recover according to the terms of the policy and the applicable law.

CHAPTER XVII
PUBLIC LANDS AND PROPERTY
INTERNAL IMPROVEMENT FUND

September 24, 1954.—054-227.

**MURPHY ACT—STATE AND COUNTY TAX SALE
CERTIFICATES—DRAINAGE DISTRICT TAXES
NOT WITHIN PURVIEW OF**

QUESTION: Where the County Tax Collector in making sales of delinquent State and County taxes, prior to June 9, 1935, and issuing tax sale certificates based thereon, included therein delinquent drainage district assessments, were the said drainage district assessments within the purview and operation of the so-called Murphy Act, that is Ch. 18296, Laws of Florida, Acts of 1937?

To: Honorable Leslie E. Avant, Clerk Circuit Court, Arcadia, Florida:

We are not advised of any statute or law making drainage district assessments part and parcel of state and county, or county, tax assessments so that they may be said to be in law state and county or county taxes. "Chapter 18296, Acts of 1937 (the so-called Murphy Act), applies only to tax sale certificates for delinquent State and County taxes and the provisions of the Act do not apply to drainage district taxes, regardless of the mechanics by which drainage district taxes are levied and assessed, 'unless there is some statute or law' effective to make the drainage district tax a part of the state and county tax." (State v. Sloan, 135 Fla. 179, 184 So. 781, text 786). Although it is probable that the statutes and laws required that the drainage assessments be assessed on the county tax roll and collected by the county tax assessor in the manner and form of state and county taxes, the fact that state and county taxes and drainage district assessments were included in the same tax sale and tax sale certificates did "not vitiate the sale nor will it destroy the lien created by operation of law on the lands assessed for either of such purposes."

We are not advised whether the drainage district assessments are made liens of equal dignity or the drainage district assessments are liens inferior to the lien of the state and county taxes.

If liens of equal dignity we are inclined to think that the Murphy Act operated upon the lien of the state and county taxes so as to vest title to the lands in the state, subject, however, to the drainage district assessment lien of equal dignity; if the drainage district assessment lien was inferior to the lien of the state and county taxes it was wiped out by the vesture of the title in the state under the Murphy Act. If the drainage district assessment lien was equal in dignity with the lien for state and county taxes it would seem to have survived the Murphy Act (Bice v.

Haines City, 142 Fla. 371, 195 So. 919; Trustees Internal Improvement Fund v. Tampa Storm Sewer Drainage District, CCA 5th, 142 Fed. 2d 637 (328 U.S. 732, 65 S. Ct. 69, 89 L. Ed. 587), although it was not subject to enforcement so long as title remained in the state under the Murphy Act (United States v. Alabama, 313 U.S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327, text 1333).

Not being advised as to the status of the drainage district's assessment lien, as to priority, as against the lien for state and county taxes we cannot give an answer to the above stated question; however, the formula for answering the question upon ascertainment of such priorities is set out above.

PUBLIC LANDS

May 11, 1953.—053-98.

MATERIALS—"TOPSOIL"—"MUCK"—"PEAT"—"HUMUS"—
§270.11, F. S. NOT APPLICABLE

QUESTION: Do "topsoil", "muck", "peat" and "humus" materials come within the purview of §270.11, F. S.?

To: *Honorable Nathan Mayo, Commissioner of Agriculture:*

In all contracts and deeds for the sale of lands executed by the trustees of the Internal Improvement Fund of Florida and by the State Board of Education of Florida, there shall be reserved for the trustees of the Internal Improvement Fund and their successors and the State Board of Education an undivided three-fourths interest in, and title in and to, an undivided three-fourths interest in all the phosphate, minerals and metals that are or may be in, on, or under the said land. (§270.11, F. S.)

Since phosphate is the only rock mentioned in the statute, it would seem that by such omission the legislature had no intention of including other forms of rock unless primarily minerals or metals in their formation.

A metal is usually considered to be any member of the class of substances represented by gold, silver, copper, iron, lead, and tin and in popular language the term is not applied to a metallic element when in such a state of combination that its identity is disguised. (57 C. J. S. page 1074).

"Mineral" is a word of general language, and not per se : term of art or trade. It is not a definite term and is used in many senses; ordinary definitions of the dictionaries throw but little light on its signification in a given case, and therefore it is not capable of a definition of universal application, but is susceptible of limitation or expansion according to the intention with which it is used in a particular instrument or statute (58 C. J. S. page 17).

The word "mineral" is evidently derived from "mine" as being that which is usually obtained from a subsurface mine; however, many mineral substances are found upon or near the surface (58 C. J. S. pages 17, 18).

"Topsoil" is defined in Webster's International Dictionary as "surface soil, as distinguished from subsoil."

"Muck" is defined in Webster's International Dictionary as "Earth (including soft earth, gravel, hard pan and rock) to be or being excavated".

"Peat" is defined in Webster's International Dictionary as "a piece of turf cut for use as fuel. Any mass of semicarbonized vegetable tissue formed by partial decomposition in water of various plants, especially mosses of the genus *Sphagnum*. Cf Coal. Peat varies in consistency from a turf to a slime. As it decomposes its color deepens, old peat being dark brown or black, and keeping little of the plant texture. According to its formation, it is known as bog peat (mosses), heath peat, meadow peat (grasses and sedges) forest peat or wood peat (trees), and sea peat (seaweeds)."

"Humus" is defined in Webster's International Dictionary as "a brown or black material formed by the partial decomposition of vegetable or animal matter; the organic portion of soil. It is a complex and varying mixture."

Although "topsoil", "muck", "peat", and "humus" may contain some mineral substance, sand and clay also contain some mineral. "Topsoil", "muck", "peat", and "humus" are not considered to be "mining minerals" and we do not think the statute contemplates that they be classified as metals or minerals any more than sand and clay.

We think that in view of the foregoing observations the question should be answered in the negative.

CHAPTER XVIII

PUBLIC BUSINESS

GENERAL AND MISCELLANEOUS APPROPRIATIONS

June 30, 1953.—053-139.

PUBLIC OFFICERS AND EMPLOYEES—DUAL EMPLOYMENT—COMPENSATION—§9(4), Ch. 28115, ACTS 1953 APPLICABLE

QUESTION: May an employee of the State or one of its boards, commissions or agencies, who is also a duly appointed or elected member of some other state board, commission or agency with the status of a public officer, be paid compensation for services as such board, commission or agency member in the light of subsection (4), §9, Ch. 28115, Laws of Florida, Acts of 1953?

To: State Budget Commission, CAPITOL:

Said subsection (4) of §9, Ch. 28115, provides that "no person may hold more than one employment, or receive compensation simultaneously from more than one appropriation, from any funds in the State Treasury or other state funds, except by and with the consent and approval of at least five (5) members of the State Budget Commission." Ch. 28115, Laws of Florida, Acts of 1953, is the Biennial Appropriations Act for the biennium beginning July 1, 1953.

State officers and employees, when traveling on state business, are allowed a per diem for subsistence and for transportation (§112.061, F. S.); however, this per diem and transportation is in the nature of reimbursement for moneys put out and not compensation for services.

Under Ch. 28215, Laws of Florida, Acts of 1953, which act relates to regulation by the state of certain administrative boards, administrative board members are authorized under said act to be paid \$10.00 per day while attending official board meetings not to exceed twelve meetings per year and per diem and mileage authorized under §112.061, F. S. Under other similar statutes and laws certain public officials including most members of regulatory boards are paid compensation for their services in addition to per diem and mileage. There is however a clear distinction between per diem as reimbursement for subsistence and travel expenses authorized under §112.061, F. S., and similar laws and per diem as compensation for services allowed under said Section 28215 and similar statutes and laws. (67 C.J.S. 331, Section 91). We think that subsection 4 of §9 of Ch. 28115 aforesaid, relates to compensation for services and that payments under said §112.061 are not within the purview of said subsection 4 of §9 of Ch. 28115.

In the light of the foregoing observations, we are of the

opinion that the above question must be answered in the negative with the exception that such an employee may hold more than one employment or receive compensation simultaneously from more than one appropriation from any funds in the state treasury or other state funds with the consent and approval of at least five members of the State Budget Commission. In this connection, due regard must be taken between compensation for services rendered and payment by way of reimbursement under §112.061 and similar statutes and laws for money expended in connection with travel and subsistence.

July 9, 1954.—054-159.

APPROPRIATION—ITEM 16, G, 4,—USE OF FUNDS—
§282.01, F. S.

QUESTION: May any unused portion of the appropriation made by §282.01, Item 16, g, 4, of the F. S., 1953, be used for Item 16, g, 1, 2 and 3, of said statutes, in the event of a deficit in these items for the current fiscal year?

To: *Honorable Thomas D. Bailey, State Superintendent of Public Instruction:*

The following footnote is appended to subitem "g" of Item 16 of §282.01, F. S.:

"The funds appropriated herein shall be expended in accordance with Chapter 236, F. S., as amended; provided, however, that no funds shall be used for recalculation purposes except those in Item 4 above."

This footnote clearly indicates a legislative purpose or intent that the funds appropriated by said subitem "g" may be used for any purpose within the purview of Chapter 236, F. S.; with the limitation that none of such funds may be used for recalculation purposes other than those provided in said subitem "4".

This footnote serves the purpose of broadening the use of the funds in the four subitems of the appropriation so that any surpluses in said items may be used for the other items, except that none of such funds can be used for recalculation purposes other than those in subitem 4. The footnote would appear to be meaningless surplusage in the appropriation if it were not given this interpretation. Moreover, this conclusion is not disturbed by §215.41, F. S., which being in general terms is applicable to all appropriations and must be read in connection with and subject to the language of said footnote of this specific appropriation.

The above question is answered in the affirmative.

PUBLIC PRINTING AND STATIONERY

December 16, 1954.—054-260.

FLA. A. & M. UNIVERSITY—ENGRAVED DIPLOMAS—
PUBLIC PRINTING—§283.03, F.S.

QUESTION: Does §283.03, F.S., requiring all public printing

to be done in the state include engraved diplomas of one of the state universities?

To: Board of Control, Florida State University:

Section 283.03, F.S., reads as follows:

"All the public printing of this state shall be done in the state, and the bond given by any contractor for such printing shall so state."

In *Arthur v. Moller*, 24 Law ed. 1046, the Supreme Court of the United States, quoting Webster, said that "to print" means "to take an impression of; to copy or take off the impress of; to stamp. Hence, specifically, to strike off an impression of, or impressions of, from types, stereotype or engraved plates, or the like, by means of a press; or to print books, handbills, newspapers, pictures, and the like. To mark by pressure; to form an impression upon; to cover with figures by a press or something analogous to it;..."

See also *State v. Lee*, 7 So 2d 110.

It is my opinion that the word "printing", in §283.03, F.S., includes engraving.

SEMINOLE INDIAN RESERVATION

April 21, 1954.—054-97.

SEMINOLE INDIANS—HUNTING—SUBJECT TO REGULATIONS OF GAME AND FRESH WATER FISH COMMISSION—BROWARD COUNTY

QUESTION: Are Indians hunting on the State of Florida Indian Reservation in Broward County subject to state hunting regulations?

To: Honorable C. W. Pace, Director, Game and Fresh Water Fish Commission, Tallahassee, Florida:

As a general proposition Indians and territory set apart for their use are subject to the jurisdiction of the United States, and Congress has broad powers to deal with Indians and their property, which, in the absence of effective relinquishment of authority by the Federal Government, are paramount to the authority of the State within whose limits the Indians may be. However, here we are dealing with lands which are not a part of the Federal public domain or in which legal title reposes in the Indians. There has been no attempt by the Legislature to divest the State of Florida, *by cession or otherwise*, of legal title to the lands and territory comprising the State Indian Reservation. On the contrary, it appears that legal title is retained by the State and the lands are held only for the use and benefit of the Seminole Indians. (See Ch. 285, F.S.)

Since the lands are not a part of what is commonly known as Indian territory, nor are they lands which have been set aside by the Congress or the United States for the Indians, the general rule

is that it is within the state's police power to enforce its conservation laws against Indians who are not living on lands as referred to above. U. S. ex rel., Marks v. Brocks, D. C. Ind., 32 F. Supp. 422, 42 C.J.S. 783.

The general rule that no state or federal statute may abridge hunting and fishing rights conferred by treaty is also inapplicable, as research fails to disclose such a treaty in the instant case.

It is an established principle that the fish and game in the state belong to the state, in trust for the use and benefit of all the people. Jurisdiction over the fresh water fish and game is vested in the Game and Fresh Water Fish Commission by virtue of Art. IV, §30 of the Const. of Florida. The Supreme Court, in several instances, when interpreting the constitutional authority of the Game and Fresh Water Fish Commission over game and fresh water fish, has held that the said commission could not be divested or robbed of its constitutional powers by legislative acts, although such acts were enacted long before the constitutional amendment giving the commission jurisdiction. I think the same applies here, that even though the Legislature by legislative act established a reservation for the perpetual use and benefit of the Seminole Indians, that such act being Ch. 285, Florida Statutes, does not supersede the constitutional authority of the Game and Fresh Water Fish Commission over the game and fresh water fish of the State of Florida.

In view of the foregoing, Seminole Indians would appear to be subject to state hunting laws and regulations when hunting on state Indian reservations. Therefore, your question is answered in the affirmative.

October 22, 1954.—054-241.

SEMINOLE INDIAN RESERVATIONS—INDIANS—HUNTING
& FISHING RIGHTS—GAME AND FRESH WATER
FISH COMMISSION—AUTHORITY

QUESTIONS: 1. Under the laws of Florida creating the Seminole Indian Reservations, are hunting and fishing rights vested in the Indians to the exclusion of others?

2. If question 1 is answered in the affirmative, does the Game and Fresh Water Fish Commission have authority to prohibit hunting and fishing by all people except the Indians on the Seminole Indian Reservations?

To: *Honorable O. E. Frye, Jr., Assistant Director, Game and Fresh Water Fish Commission:*

AS TO QUESTION 1

Section 285.02, F.S., creating the Seminole Indian Reservations, provides as follows:

"The trustees of the internal improvement fund shall convey to the board of commissioners of state institutions the title to said described lands, in trust, however, for the

perpetual use and benefit of the Seminole Indians and as a Reservation for them."

In 42 C.J.S. 690, it is said:

"An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of congress, by treaty, or by executive order,..."

In 42 C.J.S. 692-693, it is said:

"Lands set apart as a reservation cease to be public lands, ... As long as the reservation remains unextinguished, the United States holds the land in trust for the Indians ... Lands reserved for the exclusive use and benefit of Indian tribes ... are held in trust by the government for the sole benefit of such Indians,..."

Bouvier's Law Dictionary, 3rd Revision 3328, describes a trust as follows:

"Trust implies two estates or interests,—one equitable and one legal; one person as trustee holding the legal title, while another as the cestui que trust has the beneficial interest. *Hospes v. Car Co.*, 48 Minn. 174, 50 N.W. 1117, 15 L.R.A. 470, 31 Am. St. Rep. 637."

Black's Law Dictionary, 3rd Edition 683, describes equitable and legal estates as follows:

"'Equitable estates' are in equity what legal estates are in law; the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following 'the equitable estate,' which is the substance. *Town of Cascade v. Cascade County*, 75 Mont. 304, 243 P. 806, 808."

Under the provisions of §285.02, *supra*, a trust estate is created. The Board of Commissioners of State Institutions, as trustees, hold legal title to the lands of the Seminole Indian Reservations and the Indians as beneficiaries hold the equitable interest or estate. In the beneficial interest of the Indians lies the *real ownership and substance* of the trust estate.

From the very nature of this trust estate, created by the Legislature, everyone, except the Indians, is excluded from any beneficial interest, or real ownership, in the lands of the Reservations.

In 42 C.J.S., 709, it is said:

".... a treaty providing that white men shall be excluded from Indian lands has been held to mean that *whites are excluded from any beneficial interest in the lands and may be excluded from physical presence on the lands if their presence thereon or acts are inimical to Indian welfare, or if they are there without the consent of the tribe;...*" (Emphasis supplied.)

It appears that hunting and fishing on the Seminole Indian Reservations by anyone other than the Indians, themselves, would be inimical to the welfare and rights of the Indians in the use of their trust estate, and that the physical presence of anyone except the Indians on the Reservations for the purpose of hunting and fishing is excluded, unless, of course, such physical presence is with the consent of the Indian occupants.

In Opinions 044-60, February 19, 1944, and 044-110, March 31, 1944, my predecessor, in the Biennial Report of the Attorney General, 1943-1944, page 304, has held that the right to keep hunters and trespassers off the Indian Reservations is unquestionably in the Board of Commissioners of State Institutions as a part of its duty in the administration of the trust estate. It is suggested that public posting would be one way to accomplish the prohibition of hunters and trespassers on the Reservations.

Based upon the above authorities, Question 1 is answered in the affirmative.

AS TO QUESTION II.

Opinions 044-60 and 044-110, *supra*, hold that the Board of Commissioners of State Institutions has the right and the duty to keep hunters and trespassers off the Seminole Indian Reservations, and that said duty may not be delegated. It appears from law and practice that the duties and functions of the Board are more policy making than ministerial, as it appears that said Board is not equipped for the performance of ministerial duties.

I am in accord with the views expressed in opinions 044-60 and 044-110, *supra*, that the Board of Commissioners of State Institutions may not delegate its duties in so far as said duties are policy making, but where the duties of the Board become ministerial, in the absence of facilities for the performance of such duties, it is my opinion that such ministerial duties may be delegated to some other agency through cooperative agreement. I find no provision in the laws of Florida which would preclude the Game and Fresh Water Fish Commission from entering into a cooperative agreement with the Board of Commissioners of State Institutions to administer and enforce the duties of the Board in protecting the Seminole Indian Reservations from unauthorized hunting and fishing, if such an arrangement should be determined by the Game and Fresh Water Fish Commission to be consistent with its policies and responsibilities in serving the best interests of the State in the conservation of game and fresh water fish.

Therefore, it is my opinion, in the interest of the State in conservation of game and fresh water fish and Indian welfare, that the Game and Fresh Water Fish Commission has authority to prohibit hunting and fishing by all people except the Indians on the Seminole Indian Reservations if the administrative duty of the Board of Commissioners of State Institutions to prohibit such hunting and fishing has been duly delegated to the Game and Fresh Water Fish Commission through cooperative agreement. As qualified, this answers your second question in the affirmative.

However, it appears that Seminole Indians are subject to State hunting and fishing laws when hunting or fishing on the Indian Reservations. See Opinion 054-97.

PUBLIC BUSINESS GENERALLY

May 26, 1953.—053-109.

STATE ADVERTISING COMMISSION—FUNDS—OUT-OF-STATE ADVERTISING—TELEVISION INCLUDED

QUESTION: Does the Florida law authorizing the State Advertising Commission to expend funds for radio advertising outside the state, include advertising through television?

To: *Honorable Warren Blackmon, Administrative Assistant to Governor McCarty:*

Section 286.19, F. S., provides, "The advertising commission shall limit its dissemination of information pertaining to Florida to the following media: . . . (4) Radio advertising over out-of-state networks . . ." This section also authorizes advertising outside the state in newspapers, magazines, outdoor advertising, moving pictures and through the distribution of advertising literature.

It would seem apparent that the legislature sought to limit the advertising commission to the use of advertising media which is national or interstate in scope and purpose.

Although the term television is not specifically used in the statute, radio is specifically authorized and in my opinion television is merely a variation of radio communication. 44 Am. Jur., par. 2, states:

"Definitions.—'Radio communication' has been defined by the Federal Communications Act as 'the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.' The same statute defined 'broadcasting' as 'the dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations.'"

Although there are technical differences in the mechanical means of broadcasting television as contrasted to radio, the basic purpose and effect in so far as advertising is concerned is the same. Both radio and television are so designed as to bring programs of educational or entertainment value directly into homes and public places by means of a wireless transmitter and receiver. Advertisers have found that it is profitable to sponsor such programs in return for the privilege of directing the attention of the public to their products or services as an incidental part of the programs.

Section 286.19, F. S., was enacted in 1945. At that time television was still in an experimental stage and its value as an improved means of radio broadcasting had not been proved. With the advent of television as a tremendously successful means of advertising, subsequent to World War II, its regulation and control by the Federal government was placed under the same agency, the Federal

Communications Commission, which was already in charge of the radio industry. The reasons for this are obvious since the two means of communication are interrelated and similar in their methods of operation as pointed out in the above quoted definition of radio communication.

Your attention is directed to Attorney General's Opinion No. 052-40 (copy enclosed) in which I considered a similar problem and reached the conclusion that §99.172 (15), F. S. relating to campaign expenditures applied to television as well as radio.

Since "television" as it now exists, is a major means of advertising and is national or interstate in scope and since it is directly related to radio, I believe that it would be contrary to the dictates of common sense to take the position that the Legislature intended to bar television as a media of advertising for the State of Florida.

It is therefore my opinion that your question should be answered in the affirmative.

September 15, 1954.—054-222.

MODIFICATION OF OPINION NO. 049-39
FLORIDA BOARD OF FORESTRY—WITHDRAWAL OF BID
BY BIDDER—RETURN OF DEPOSIT.

QUESTION: Invitations to bids were extended by the State Forester for the sale of certain pulpwood from lands under the management and control of the Board of Forestry. A bidder pursuant to the invitation submitted a sealed bid, together with a cashier's check for \$500.00. Upon being notified by an employee of the Board that his bid was high and "will be awarded to you subject to approval by the Florida Board of Forestry," the high bidder requested permission to withdraw his bid, asking return of the \$500.00. Under such circumstances may the bidder be permitted to withdraw his bid and obtain return of his bid deposit?

To: *Honorable C. H. Coulter, State Forester:*

It should be stated at the outset that the high bidder in attempting to withdraw stated it was "...due to my ignorance regarding your purchase requirements". He stated he relied solely upon the published invitation to bid as to method of payment, and made no effort to obtain further details from the Forest Manager, although the advertisement stated:

"Full information, contract specifications, and other details should be obtained from the Forest Manager, Munson, Florida."

The State Forester's letter of August 27, 1954, responding to the bidder's letter of withdrawal, indicates the information was furnished the bidder.

In *Graham v. Clyde* 61 So. 2d 657, the successful bidder, who had been awarded a contract, was not permitted to withdraw his bid upon the basis of a clerical mistake made by the contractor in his calculations. We find no Florida case dealing with attempted

withdrawal after opening of the bids but prior to formal award of the contract.

The very purpose of requiring a deposit by way of guarantee is to show the good faith of the bidder and his willingness to perform the contract.

It is generally held that a bidder has no right to withdraw his bid or recover the deposit made pursuant to the requirements of advertisement for bids upon a public contract (43 Am Jur, Public Works and Contracts, §62; 63 C.J.S., Municipal Corporations, §1152b; 3 McQuillin, Municipal Corporations, 2d Edition, §1324.)

In referring to bids upon public contracts, the court in *North-eastern Construction Company vs. City of Winston-Salem*, 83 F. (2d) 57, 104 A. L. R. 1142 (CA, 4th circuit) said: "The weight of authority is to the effect that bids of this nature are irrevocable and cannot be withdrawn, especially after the opening of the bids". "The letting of public contracts by competitive bidding is for the protection of the public and the public authorities are without the right to permit a bid for the contract to be withdrawn in the absence of circumstances that would render it inequitable not to permit its withdrawal." (*City of Hattiesburg vs. Cobb Brothers Construction Company* 184 So. 630, 631).

It may be stated that generally equitable relief can be had if a bidder makes a material mistake in his bid, where he promptly, upon its discovery, notifies the public authority and requests withdrawal (43 Am. Jur., Public Works and Contracts, §63; 5 A.L.R. 827, 80 A.L.R. 876; 107 A.L.R. 1451).

I conclude that while equity will relieve against a material mistake made by a bidder, a public authority has no right to permit withdrawal except in unusual circumstances. Even though we accept the bidder's contention of ignorance of the terms of the contract, it is difficult to see how he can escape his own carelessness of not seeking the information from the source stated in the advertisement for bids.

The question is answered in the negative.

Opinion 049-39 is hereby overruled to the extent of any conflict herewith.

STATE PURCHASING COUNCIL

November 4, 1953.—053-299.

COMMODITY—USE OF BRAND NAME—COMPETITIVE BIDS

QUESTION: Whether under Ch. 28056; Ch. 287, F. S., 1953, or any other existing law, there is any provision which would prohibit naming a commodity by brand name when required to advertise for competitive bids, when it is intended to purchase only a certain brand name commodity for any one of a number of reasons?

To: *Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council, CAPITOL:*

I do not find that there is any such prohibition in Ch. 28056 or any other law. I am of the opinion that if it is determined by the executive authority of any state agency that only the commodity manufactured by a particular manufacturer will meet the needs for which such item is to be used, that the brand name or other sufficient description may be used in the advertisement. For instance, if it is determined that a Jeep truck, a Chevrolet sedan, an International Business Machine, a certain brand of livestock food, etc. best meets the requirements then such should be specified.

A lengthy specification composed or designed solely for the purpose of eliminating competitors other than those able to supply a particular brand name commodity should be avoided and the actual name or common description should be used when no other of its kind would be equally satisfactory.

March 3, 1954.—054-55.

STATE PURCHASING COUNCIL—POWERS—MOSQUITO
CONTROL DISTRICT PURCHASES—STATE FUNDS—
COMPETITIVE BIDS

QUESTION: "What are the powers and duties of the State Purchasing Council regarding the manner in which a Mosquito Control District reaches a decision to award a purchase order to a particular bidder after receipt of competitive bids where using state funds?"

To: Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council, TALLAHASSEE:

The question arose following the award by a Mosquito Control District of an order for a dragline to a bidder whose bid was not the low price bid, but whose machine, in certain features, excelled the specifications which were stated in the invitation to bid to be minimum specifications. In the opinion of the Mosquito Control Board, the extra value to the District of the features wherein the machine purchased exceeded the minimum specifications justified the award of the order therefor at the higher bid price.

Chapters 388, 389 and 390, F. S., provide the Legislative authority and methods for creation of Counties, Cities, Towns, or portions thereof, and Special Taxing Districts, into Mosquito Control Districts.

Sections 389.13-21, F. S., provide for contributions from state funds to Mosquito Control Districts to be used exclusively for the control of arthropods. Such funds to be used "exclusively for permanent eliminative measures, such as sanitary land fills, drainage, diking, filling of mosquito and sand fly breeding areas, and the purchase, maintenance and operation of all types of equipment including trucks, dredges, draglines, bulldozers, or any other type or types of machinery and/or materials utilized in ditching, ditch lining, ditch construction, diking, filling, hiring personnel and payment for contracting for such work under competitive bids."

Each District and County receiving state funds under the program is required, at the end of each month, to submit to the State

Board of Health, a separate itemized statement for expenditures from County funds and State funds.

From the foregoing it is seen that, certainly to the extent that a Mosquito Control District and a County, acting in cooperation with the State Board of Health, uses said state funds, they are agencies of the State. In legal effect, such is a cooperative state function administered by the State Board of Health and the Mosquito Control District, and expenditure of state funds derived from the taxation of all the people in the cooperative program is subject to regulations governing other state agencies' expenditures where purchasing is involved.

Chapter 287, F. S., (the Purchasing Council Act) makes all agencies of the state subject to its provisions, which are cumulative and supplemental to existing laws relating to purchasing.

The Purchasing Council is required to adopt and publish purchasing regulations governing the purchase by any agency of commodities, establishing standards and specifications and maximum fair prices for such commodities. That section also provides that after adoption and publication of such purchasing regulations, no agency of the State of Florida shall purchase any commodities covered by such existing purchasing regulations unless such commodities be in conformity with the standards and specifications and the price does not exceed the maximum fair price established by the purchasing regulation.

The Purchasing Council is also authorized to study the purchases by agencies of the state, and may, under §287.07, F. S., require each and every agency of the state to furnish information concerning current or past purchasing practices and methods, including actual purchases made.

It is seen, therefore, that the State Purchasing Council, under its statutory power, including the making of appropriate regulations and the power to require purchasing information, has been given what amounts to rather broad supervisory authority over purchasing by state agencies. To make this authority effective, the Purchasing Council can bring to the attention of any state agency any failure on its part to comply with the statutes and the Council's regulations governing purchasing, and the Council may deem it appropriate to report violations to those having power to require enforcement of such governing statutes and regulations, including the State Comptroller, the Governor, prosecuting officers or the courts.

These observations answer the above-stated question as well as it may be here answered.

November 5, 1953.—053-302.

COMPETITIVE BIDS—ADVERTISEMENTS—REQUIREMENTS UNDER CH. 287 F. S., 1953

STATEMENT: You have handed me two proposed forms of advertisements that have for their purpose the soliciting of invitations to bid and request my opinion as to their legal sufficiency to meet the competitive bidding and advertising requirements of

Ch. 28056, Laws of 1953. The first form as proposed to be used by the State Road Department reads as follows:

**"NOTICE TO DEALERS
OFFICE OF THE STATE ROAD DEPARTMENT**

Tallahassee, Florida

October 5, 1953

Sealed bids will be received in the Purchasing Division of the State Road Department until 10:30 a.m. (E.S.T.) on the 21st day of October 1953, for furnishing our requirements of Food Supplies for delivery during November to the State Road Department Convict Camps at various locations designated on the Bid Blanks.

Bid Blanks and specifications may be obtained from this office.

Right is reserved by the State Road Department to reject any or all bids.

STATE ROAD DEPARTMENT OF
FLORIDA PURCHASING DIVISION
L. K. Ireland, Purchasing Agent"

To: Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council, CAPITOL:

I am of the opinion that the above form and the description of the commodity for which bids are sought, barely meets the advertising requirements under Ch. 28056. The use of such a broad description as "Food Supplies" may be subject to criticism or at least a question of opinion as to its being the best practice, it might be possible that a little more detail would attract the interest of a larger number of suppliers, if the principal classifications of the food supplies were set out such as or similar to the following wording, "canned foods, staple groceries, meats, milk, eggs, etc." It is obvious that there would be no advantage in going much further as to description. In other words, there would be no need to breakdown the classification of canned foods in detail such as canned peas, canned okra, etc.

The second form submitted as proposed to be used by the purchasing agent for the Board of Commissioners of State Institutions reads as follows:

"LEGAL NOTICE

Competitive bids will be received by the Board of Commissioners of State Institutions during the month of July 1953 for:

Institutional Supplies and Equipment

If interested in quoting bid blanks and specifications may be obtained upon application to the Board of Commissioners of State Institutions, Purchasing Department, P. O. Box 11, Chattahoochee, Florida

Dan W. D'Alemberte
Purchasing Agent"

I am of the opinion that the foregoing form does not comply

with the intent of Ch. 28056 and does not provide the information as contemplated by most statutes which require advertising for competitive bids. The description "Institutional Supplies and Equipment", particularly since the institution or institutions are not described, very probably would fail to attract the attention of some dealers who could supply some of the commodities for which bids are sought. Such a description is too vague. A great many people do not know for example, that the State Hospital operates its own power plant, beauty parlor, mortuary and dairy, or that it buys various kinds of equipment used on farms; the same would apply as to items used by the State Prison, Florida Farm Colony, etc. While each individual item need not be set out in detail, the group classifications within which the items fall should be listed.

For further example, such a description as "dry goods" would be too broad and should be broken down as to men or women's clothing, bed clothing, towels, etc. Beauty parlor supplies and equipment would be sufficient without listing in detail such things as shampoo, tonic, curlers, dye, etc. The word "fuel" alone would not be sufficient since as a rule there are different dealers in coal, fuel oil, bottled gas, etc. In other words, a description of the commodity or the group of commodities should be in sufficient detail as to leave no doubt in a supplier's mind should he read the advertisement as to whether or not he could furnish such a commodity or commodities and such should be the principal test as to the sufficiency of the description.

The proposed form does not set a time limit or time limits for the submission of bids because, I am informed, bids for different items will be opened on different days during the month. I know of no reason why different times within a month for the acceptance of bids for different commodities could not be set out and included in one advertisement, provided the advertisement was published at least once a week for not less than two consecutive weeks prior to the earliest date on which bids are to be received. Such dates could be listed along with the commodity or groups of commodities without requiring any appreciable additional space.

September 28, 1953.—053-254.

STATE PURCHASING COUNCIL—MOTOR VEHICLE PURCHASES—COMPETITIVE BIDS—METHOD OF ADVERTISING

STATEMENT
AND
QUESTIONS:

The Park Service attempting to comply with §8, Ch. 28056, advertised in three major newspapers inviting bids to cover the following equipment: three Willys, 4-wheel drive pick-up trucks, two Ford pick-up trucks, and one Chevrolet pick-up truck. Bids were received up to 12:00 noon September 4 at which time they were opened. Four competitive bids were received on the three Willys. One bid only was received on the two Fords and no bids were received on the one Chevrolet.

You request an opinion on the following questions:

1. Will it be necessary to throw out the single bid received for the two Ford pick-up trucks and readvertise for bids (the total purchase price for the two Fords would be in excess of two thousand dollars)?
2. Will it be necessary to readvertise for bids on the Chevrolet, knowing that the purchase price of it will be less than two thousand dollars?

To: Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council:

Section 8, Ch. 28056, Laws of 1953, reads: "No purchase shall be made where the purchase price thereof is in excess of one thousand dollars (\$1,000.00) unless made upon competitive bids received; and when the purchase price is in excess of two thousand dollars (\$2,000.00) no purchase shall be made unless competitive bids are received after advertising therefor in a newspaper of general circulation at least once a week for not less than two consecutive weeks prior to the date on which bids are to be received;" Procedure is provided in the section for making purchases without securing bids in case of an emergency.

You advise that no real emergency exists, therefore, the provision in the section as to emergency purchases need not be considered here.

It appears that no solicitation of prospective bidders was made by mail or otherwise and that the advertising in the newspapers was the only attempt made to secure competitive bids. Such sole reliance on newspaper advertising or the bare compliance with the bidding requirements of the statute is obviously not according to good purchase practices. I suggest that you consider the advisability of proposing a purchasing regulation to the State Purchasing Council that would require the use of mailing lists or other manner of soliciting bids in addition to advertising.

As to question number one, I am of the opinion that only one bid on the two Fords, the purchase price of which would be in excess of two thousand dollars, does not comply with the requirement in section 8 that no purchase shall be made unless *competitive bids* are received after advertising. The words "competitive bids" contemplate more than one bid, therefore, the requirements of said section have not been met. There could be instances where only one person or firm could furnish a particular commodity and only one bid could possibly be secured and which might justify an exception as to a requirement for readvertising but such is not the present case.

As to question number two, since it is necessary to readvertise for the two Fords and it is contemplated that the Chevrolet, although its price is less than two thousand dollars, is an item in a lot purchase of motor vehicles representing a combined purchase price in excess of two thousand dollars, it will be required in order to comply with the spirit and intent of §8 of Ch. 28056, to include the Chevrolet with the Fords in the readvertising for bids.

September 15, 1953.—053-241.

STATE AGENCY—OFFICE EQUIPMENT—"RENTAL-
PURCHASE" AGREEMENT—COMPETITIVE BIDS
REQUIRED

QUESTION: May a state agency purchase office equipment of a price in excess of \$2,000.00 under a "rental-purchase" agreement without advertising for competitive bids in compliance with §8, Ch. 28056, Laws of 1953?

To: *Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council:*

Under date of March 21, 1949, I rendered an opinion (049-114, page 170, Biennial Report of the Attorney General, 1949-1950) copy of which is attached hereto, in which I held that a board of county commissioners could not buy machinery under a "rental-purchase" agreement without complying with the competitive bidding statute regulating county purchases.

Consistent with my holding in the above mentioned opinion, your question must necessarily be answered in the negative.

October 8, 1953.—053-262.

STATE PURCHASING COUNCIL—STATE AGENCIES—
PURCHASES—COMPETITIVE BIDS—REQUIRE-
MENTS—CH. 287, F. S., 1953

QUESTIONS: 1. Do the provisions of Ch. 28056 affect the requirements of §321.02, F. S., relating to the requirement for bids for purchases made by the Department of Public Safety?

2. Do the provisions of Ch. 28056 affect the requirements of §341.15, F. S., relating to the requirement for bids for purchases made by the State Road Department?

3. Do the provisions of Ch. 28056 affect §341.141, F. S., providing for purchases to be made by the State Road Department from the United States without advertising for bids?

4. Do the provisions of Ch. 28056 affect the existing policy or prohibit the adoption of a policy by a state agency requiring bids or the advertising for bids for purchases of less than one thousand dollars?

To: *Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council:*

Section 8 of Ch. 28056, Laws of 1953, provides that "No purchase shall be made where the purchase price thereof is in excess of one thousand dollars (\$1,000.00) unless made upon competitive bids received; and when the purchase price is in excess of two thousand dollars (\$2,000.00) no purchase shall be made unless competitive bids are received after advertising therefor in a newspaper of general circulation at least once a week for not less than two consecutive weeks prior to the date on which bids are to be received * * *." Certain exceptions are made in cases of emergency.

Section 10 of said Ch. 28056 reads: "This act shall be deemed cumulative and supplemental to existing laws relating to the purchase of commodities, and if any portion of this act is invalid for any reason, such invalidity shall not affect the remaining portions thereof."

It will be noted that there are provisions in said Ch. 28056 which specifically exempt the materials covered by Ch. 233, F. S., and specifically provides that it shall neither repeal or modify any part of Ch. 283, F. S. These exemptions relate to school books or other instructional materials and to state printing.

Section 321.02, F. S., relating to purchases by the Department of Public Safety, includes the following requirement: "* * * all supplies and equipment consisting of single items or in lots, of a value of more than three hundred dollars, shall be purchased by advertising for sealed bids at least once a week for not less than two consecutive weeks. Purchases shall be made by accepting the bid of the lowest responsible bidder; the right being reserved to reject all bids. * * *"

Section 341.141, F. S., provides in effect that the State Road Department may in its judgment purchase from the United States, or any of its agencies, commodities without first advertising for bids regardless of the price paid, provided that such price shall not exceed the open market price of such property.

Section 341.15, F. S., includes the requirement "* * * the State Road Department shall not purchase supplies or equipment of the value of three thousand dollars or more for each individual purchase except upon competitive bids received after advertising * * *".

I have been advised by you that some state agencies have followed a policy in the past of securing bids before making purchases of a price less than one thousand dollars, although not required by law to do so.

Section 2 of Ch. 28056 reads "The purpose or aims of the council shall be to promote efficiency and economy in the purchase for the state by its agencies of the commodities used by them." The legislative intent is apparent in the act as to the purposes and aims expected of the council and as to specific requirements as to certain matters, to-wit: to strengthen the purchasing procedures of the state agencies to effect economy and to require additional safeguards in the securing of the best prices by prescribing certain bidding requirements. The provisions in the act obviously require more rigid and efficient practices and additional safeguards, certainly they are not intended to relax or weaken any such that are required by existing laws or policy.

It is further a reasonable assumption that such was the intent when the provision of §10, providing that the act shall be deemed cumulative and supplemental to existing laws, is considered.

I am not unmindful that Ch. 28056 does not contain a clause specifically repealing or amending any existing laws, or parts of laws, in conflict with it.

Our principal purpose here is, after determining the intent of the Legislature in its enactment of Ch. 28056, to construe its provisions in relation to those existing laws not specifically excluded, dealing with the same subject matter.

"It has been generally held that the constitutional provisions . . . were not intended to abolish the power of the Legislature to enact acts which amend pre-existing legislation by implication only, and if an act or statute is in itself complete and intelligible without reference to other legislation, it is not within the prohibition of the constitutional provisions by reason of the fact that it amends or modifies other statutes by implication, and it is not necessary that such statutes should be re-enacted . . . as modified." 82 C.J.S., page 434.

The courts have declared that in the construction of a statute the object is to get at its spirit and meaning, its design and scope; and that construction will be justified which evidently embraces the meaning and carries out the object of the law, although it be against the letter and the grammatical construction of the act. In determining the proper construction of a statute, the entire legislation on the same subject matter, its policy and reason, as well as the text of the particular act must be looked into.

"Statutes in *pari materia*, or dealing with related subjects, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other, according to the authorities on the question, so as to give force and effect to each, since it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in expressed terms; *nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments.* In other words, apparently conflicting statutes should be so construed as to reconcile the conflict, if possible, by reasonable construction. If, however, there is an unreconcilable conflict, the latest enactment will control or will be regarded as an exception to, or qualification of, the prior statute. It is not permissible to consider the advantage from a practical point of view of one statute over another, and on that basis construe the one producing the more practical results so as to suspend the other." 82 C.J.S., page 836. (Emphasis supplied)

"In construing statutes courts are required to look to the conditions of the country to be affected by an Act, as well as the purpose declared, so as to ascertain the intention of the Legislature, and will read all parts of the Act together. Courts are required to construe statutes as they find them. The history, object and purpose of the Legislature, with the mischief to be remedied, may be considered in examining into the intention of the Legislature. Laws affecting the public policy of a State or the general welfare should receive a liberal construction. Where two legislative Acts are repugnant to or in conflict with each other, the one last passed, being the latest expression of the Legislature, usually must control." *Ideal Farms Drainage Dist. v. certain lands*, 19 So.2d 234.

As pointed out above, Ch. 28056 makes specific exceptions as to

Chapters 233 and 283 of the F. S. With reference to exceptions in statutes, I quote from the case of *Town of Purvis v. Lamar County*, 137 So. 323, wherein the court said: "... we call attention to the rule that when a statute contains exceptions in express language, there is an admonition to the courts that the exceptions thus expressed are the only ones contemplated, and that further exceptions should not be ingrafted by construction *unless the necessity therefor be inescapable or the propriety thereof be substantially incontrovertible.*" (Emphasis supplied).

In considering the effect of the words "this Act shall be deemed cumulative and supplemental to existing laws relating to the purchase of commodities. . .", as set out in Section 10 of Chapter 28056, we find little help from reported decisions in construing the words "cumulative" and "supplemental" as an aid in determining the questions being considered here. These words are rarely used in statutes except with reference to remedies, penalties or powers. In the present instance we have them incorporated in a law dealing with regulations and limitations in connection with the administering of certain governmental duties. In most instances where the courts have had to construe the word "cumulative" when dealing with remedies, penalties or powers, it has been held that the word means additional, heaping up, increasing, forming an aggregate. A cumulative remedy has been held as a remedy created by statute in addition to one which still remains in force. It may be pointed out that the law we are considering is not one of remedy or penalty. Reasoning of some value may be gathered from the case of *Merchants' Coal Co. v. Fairmont Coal Co.*, 160 Fed. 769, in which the court quotes: "In the case of *Regina v. Eastern Archipelago Co.*, 18 Eng. Law and Eq. 167-183, Judge Coolidge says: "The term 'cumulative' is not, I think, very correctly applied here: where one thing is cumulative on another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent and might, without incongruity, be applied at the same time, attachment and summary proceeding, fine and imprisonment, action for breach of covenant and ejectment for forfeiture. Two ways of doing the same thing where one or two can in fact be used may make a case of election, but they are hardly cumulative."

It would seem from the foregoing that the word "cumulative" could hardly be applied to two or more bidding statutes that are inconsistent. We are then faced with the question of the application of the word "supplemental" to the bidding requirements as set out in §8 of Ch. 28056 when read with the provisions of §§321.02, 341.141 and 341.15, F. S.

It has been generally held that a "supplemental act" is that which supplies a deficiency, adds to or completes, or extends that which is already in existence without changing or modifying the original. We think that Judge Coolidge's comments as to the incorrect application of the word "cumulative" in the case referred to may be well applicable to the use of the word "supplemental" in the present instance as the same applies to the bidding provisions and that it is not correctly applied if it presents an unreconcilable conflict.

It should be presumed that the Legislature had knowledge of existing laws relating to bidding requirements for state purchases. This is evidenced by the fact that specific exceptions were made as to Chs. 233 and 283, F. S. We may assume that the lawmakers also had knowledge of the existence of §§321.02 and 341.15, F. S.

With reference to question number one, I am of the opinion that Ch. 28056 is not repugnant to or in conflict with §321.02, F. S., said chapter provides that no purchase shall be made where the purchase price thereof is in excess of one thousand dollars without competitive bids, etc. Section 321.02 prohibits the purchase by the Department of Public Safety of any supplies or equipment consisting of single items or in lots of a value of more than three hundred dollars without advertising for sealed bids. Both laws are operative without conflict. The provisions of §8 of Ch. 28056 should apply to purchases made by agencies not governed by any other law requiring the securing of bids where the purchase price is less than the amounts set out in §8 of said Chapter. The Department of Public Safety should continue to observe the requirements of §321.02, F. S.

With reference to question number two, I am of the opinion that §8 of Ch. 28056 supersedes §341.15 and suspends any authority of the State Road Department under that section to make purchases in excess of one thousand dollars unless upon competitive bids or in excess of two thousand dollars without advertising for bids. The provisions of §8 of Ch. 28056 are clearly mandatory by its wording that "*No purchase shall be made where the purchase price thereof is in excess of one thousand dollars unless upon competitive bids . . .*," subject only to specific exceptions.

With reference to question number three, §341.141 authorizes the State Road Department whenever in its judgment it may be necessary for the proper discharge of its duties to purchase from the United States or any of its agencies any commodities at such price as may in the judgment of the department be proper, without first advertising for bids on same regardless of the value, provided that the price paid shall not exceed the open market price. This law was passed in 1945 and, undoubtedly, was enacted in order to secure price advantages in anticipation of the sale of surplus and other properties by the United States following the second world war. In the sale of such properties the United States does not as a rule bid for the sale of its commodities. If bids are involved at all it is usually the other way around, and when no prices have been fixed by the government, bids or offers are required from prospective purchasers. Therefore to construe the provisions of §8, Chapter 28056, as repealing or amending said §341.141 would defeat the purposes and intent of both laws which have as their aim the securing of the best purchase prices for the state.

It is noted that a proviso in §341.141 prohibits such a purchase when the price exceeds that of the open market. I am of the opinion that the prohibition would also apply if the price should exceed a maximum fair price established by purchasing regulations adopted by the State Purchasing Council.

With reference to question number four, the provisions of

Ch. 28056 prohibits a purchase without securing bids when the price is in excess of one thousand dollars, it does not in itself prohibit the securing of bids when the price is *less* than one thousand dollars, therefore it would not prohibit the adoption of a policy or the continuing of an existing policy by an agency to require bids for purchases of less than one thousand dollars in the absence of some rule or regulation on the subject that may be adopted by the State Purchasing Council. I do not believe, however, that an agency could incur advertising costs as a legal expenditure in securing bids where the purchase price is not in excess of two thousand dollars unless authorized by law or by a rule or regulation of the State Purchasing Council.

November 20, 1953.—053-315.

STATE PURCHASING COUNCIL—LETTERHEADS—FORMS
—PUBLIC PRINTING PURCHASES—REGULATIONS—
EXEMPTION

QUESTION: Are printed letterheads and standard forms, stationery within the meaning of §283.21, F. S., and thereby exempt under §11 of Ch. 28056, Laws of Florida, 1953, when preparing standards and maximum prices under the provisions of Ch. 28056?

To: *Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council, CAPITOL:*

A comprehensive response to your request necessarily requires some collateral comments which I include herein.

Section 283.21, F. S., provides:

"The comptroller shall purchase from parties in this state manufacturing same, all the blank books, stationery and paper to be used in the different departments; . . . provided, that they can be bought on as fair and reasonable terms as elsewhere, taking quality into consideration."

Section 11 of Ch. 28056, Laws of 1953, reads:

"Specifically, this act shall neither repeal nor modify any part of Chapter 283, Florida Statutes."

A casual reading of §283.21 would indicate that it was intended the comptroller should purchase blank books, stationery and paper to be used by all state departments, however, the phrase "different departments" in so far as we have been able to determine, and as I am advised by the comptroller's office has been the construction applied by that department, has been construed as not applying to purchases made by departments of the state which either by statute or by operation under the general appropriation acts are authorized to purchase their own supplies (see *Clark Printing and Binding Co. vs. Lee*, 158 So. 461 and 163 So. 702.)

Section 283.01 reads:

"All the public printing of the State of Florida shall be let out on contract to the lowest responsible bidder who shall furnish all paper and other materials used in printing and binding."

Other sections of Ch. 283 require that each printing job shall be let separately to the lowest responsible bidder who shall manufacture same within the state. The necessity for bids appears to be required on all proposed printing jobs regardless of the value.

It is clear that the purchase of public printing jobs is controlled by the provisions of Ch. 283 F. S., which Chapter is not repealed or modified in any part by Ch. 28056, Laws of Florida 1953. The determination of whether some commodities are to be classified as public printing or not, probably will from time to time create problems that must be determined as they arise. In the case of Clark Printing and Binding Co. vs. Lee, the court had a like problem before it and that part of the opinion reduced to syllabus reads:

"Whether motor vehicle commissioner's purchase of carbon strippers, consisting of sheets of paper which contained motor vehicle department form and were cemented to sheets of carbon, constituted purchase of stationery supplies or purchase of printing job which could not be awarded to out-of-state corporation, was mixed question of law and fact which it was within official province of commissioner to decide in advance of comptroller."

The court said further:

"The authorities on the subject are not in harmony, but may be said to justify a reasonable contention that forms specially gotten up and printed for particular uses should ordinarily be regarded as constituting a printing job. However, the question is by no means reduced to a simple question of law, wholly disconnected from its associated factual considerations, the ascertainment of which involves considerable difficulty."

One of the exhibits in the above case was a copy of an opinion of Attorney General Carey D. Landis, dated July 2, 1934, to the acting Motor Vehicle Commissioner, in which he advised that "a bill presented by Zip-Out Products as aforesaid should be paid if the cost of the printing on this Zip-Out carbon stripper is merely an incidental part of the total cost of the form."

In a United States tariff case (Kraut vs. United States, 134 F. 701) the court held that paper bags elaborately printed with advertising matter were not dutiable as printed matter, saying:

"The articles are paper bags, and have become by a process of manufacture a distinct article for use as such, and the printing thereon is merely incidental thereto, and is not a controlling feature. It may be observed that cartons and boxes made of paper frequently have on the outside some printing to indicate the character, quantity or quality of the merchandise packed or sold therein, yet it cannot be said that those articles are properly dutiable as printed matter."

I am of the opinion that printed or engraved letterheads and printed forms manufactured pursuant to order and specifications provided by any state department is public printing within the

purview of Ch. 283. On the other hand, the purchase or order for the manufacture of envelopes, special containers or wrappers for mailing, bearing only the printed return address of the sender, very probably would not be held as a public printing purchase by the courts. The foregoing items whether designated as public printing or not are items of stationery, and as such together with other items of stationery, blank books and paper would if purchased by the comptroller under §283.21, be exempt from the provisions of Ch. 28056.

I am of the opinion that all items of stationery (other than those which are properly classified as public printing), including paper, blank books and standard forms that are carried as stock merchandise by suppliers, are commodities the purchase of which, by state departments other than the office of comptroller, may be regulated by the State Purchasing Council under the provisions of Ch. 28056.

Briefly the answers to your questions are as follows:

1. Letterheads are stationery but when printed on order of any state department, are also public printing purchases within the intent and provisions of Ch. 283 F. S., and as such under the exception in §11 of Ch. 28056, Laws of 1953, are not subject to regulation by the State Purchasing Council.

2. Blank books, paper and other items of stationery including forms and other printed items usually carried as merchandise by stationers, are commodities subject to State Purchasing Council regulations, applicable to all state departments, except when purchases of these items are made by the state comptroller.

December 10, 1953.—053-326.

STATE AGENCIES—PURCHASES—COMMODITIES FOR RESALE

QUESTION: Do the Provisions of Ch. 28056, Laws of 1953, (State Purchasing Council Act) cover the purchase of commodities by the book stores operated by the several universities or the commissaries operated by certain state institutions when such purchases are made primarily for resale?

To: *Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council, CAPITOL:*

Chapter 28056 creates a State Purchasing Council. Section 2 of said act provides that "the purposes or aims of the Council shall be to promote efficiency and economy in the purchase for the state by its agencies of the commodities used by them. Section 3(a) provides that "the word 'agencies' shall mean and include all the various state agencies, offices, departments, boards, commissions and institutions." Section 3(b) reads: "The word 'commodities' shall mean and include the various commodities, goods, merchandise, equipment and other personal property purchased by the agencies of the State of Florida, but not including the materials covered by Chapter 233, Florida Statutes."

Section 3(b) as noted makes an exemption as to Ch. 233, F. S. The only other exemption or exception to the provisions and require-

ments of Ch. 28056 is found in §11 of the act, which reads: "Specifically, this act shall neither repeal nor modify any part of Chapter 283, Florida Statutes."

It appears that the legislature in its enactment of Ch. 28056, Laws of 1953, considered that the provisions and requirements of Chs. 233 and 283, F. S., were sufficient to provide the necessary efficiency, economy and good purchasing practices by state agencies in the purchase of the commodities covered by these two chapters of the Florida Statutes. No other purchases are expressly excluded from the act.

Briefly, Ch. 28056 makes mandatory the securing of competitive bids on purchases in excess of \$1,000 and requires advertising in a newspaper of general circulation for bids on purchases in excess of \$2,000. It is also provided that the Council shall provide for the adoption by it of purchasing regulations, the establishing of standards and specifications, and the fixing of maximum fair prices.

Nowhere in Ch. 28056 is there found any authority that would permit the Council to relax the bidding and advertising requirements for purchases of commodities by any state agency.

The Council may, however, (except as to bidding and advertising requirements) make an exception as to a particular state agency in a regulation adopted by it relating to purchasing procedures, standards and specifications or even maximum fair prices, if there are circumstances peculiar to the kind, quantity, handling or use of such commodities or peculiar to the operation of the agency itself.

The words "used by them" in §2, in my opinion, cannot be construed as an intention of the legislature to remove commodities purchased for resale from the operation of the act. In fact, this conclusion is further strengthened by the definition of the word "commodities" in Section 3(b) wherein the word "merchandise" is included with the words "goods," "equipment," "various commodities" and "other personal property." The word "merchandise" has been generally held by the courts as meaning all commodities which merchants usually buy and sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce.

Therefore, if the purchases contemplated by your question are made by any state agency as defined in §3 (a) of Ch. 28056, the fact that they are commodities purchased for resale will not remove such transactions from the provisions of the act.

December 28, 1953.—053-337.

COMPETITIVE BIDS—ADVERTISING—LENGTH OF TIME

QUESTION: Under the provisions of §8 of Ch. 28056, Laws of 1953, Ch. 287, F. S., which provides "... and when the purchase price is in excess of \$2,000 no purchase shall be made unless competitive bids are received after advertising therefor in a newspaper of general circulation at least once a week for not less than

two consecutive weeks prior to the date on which bids are to be received; . . .", how many days must elapse between the date of each publication and the date on which bids are to be received?

To: Honorable Ralph R. Siller, Executive Secretary, State Purchasing Council:

In an opinion dated June 19, 1930, rendered by Attorney General Fred H. Davis (Biennial Report of the Attorney General 1929-30, page 224), it is quoted that "The Supreme Court has held that in order to constitute a publication once each week for four consecutive weeks the date of the first publication must be at least twenty-eight days prior to the time of the happening of the act which is required to be preceded by the publication."

In my opinion, in order to comply with the language and intent of §8, Ch. 28056, Laws of 1953, the first publication of the advertising for competitive bids must be made not less than fourteen days prior to the date set for receiving the bids and the second publication must be made not less than seven days prior to the date on which bids are to be received, (Sundays included).

For example, if it is advertised that bids are to be received on the 23rd day of a month, the second publication should appear not later than the 16th day and the first publication should appear not later than the 9th day of the month.

A day begins at midnight and ends the following midnight (185 So. 569). If a notice is required to be given a stated number of days prior to a day to be specified, that time should be computed counting and including the day notice is given and excluding the specific day of performance (Biennial Report of the Attorney General 1945-46, page 720).

August 24, 1954.—054-208.

STATE PURCHASING COUNCIL—PURCHASES—TERM OR ANNUAL REQUIREMENTS—COMPETITIVE BIDS

QUESTION: Does the State Purchasing Council have authority to negotiate contracts for purchase of term or annual requirements of a commodity to be delivered in lots as required, where the cost of the term requirements exceeds one thousand dollars, without securing competitive bids?

To: Honorable Ralph Siller, Executive Secretary, State Purchasing Council, CAPITOL:

It is true, as you state in your letter, that subsection 2 of §287.05 (third clause), F. S., appears to sanction term agreements for the requirements of commodities. It is to be noted, however, that that clause is limited by the words "... obtaining of competitive bid prices ..." occurring therein.

It would hardly be seriously contended that a contract to purchase term or annual requirements is not a purchase, even though actual deliveries are in small lots.

I find nothing in Ch. 287, F. S., that modifies the positive requirement of competitive bids on purchases amounting to more than one thousand dollars except the permissive emergency purchase provision contained in §287.08.

The answer to your question is, therefore, in the negative.

CHAPTER XIX
PENSIONS AND WAR VETERANS
UNIFORM VETERANS' GUARNIANSHIP LAW

December 16, 1954.—054-266.

**CLERKS CIRCUIT COURT—DOCUMENTS—CERTIFIED
COPIES TO VETERANS—§293.15, F.S.**

QUESTION: Is the clerk of a circuit court required to furnish more than one free copy of a recorded document to a veteran who needs the copies to comply with the requirements of the U. S. Veterans Bureau in securing a particular benefit available to the veteran through the bureau?

To: Miss Thelma Lewis, Clerk Circuit Court, Hamilton County, Jasper, Florida:

Section 293.15, F.S. provides:

"Certified copies of public records made available without charge.—Wherever a copy of any public record is required by the bureau to be used in determining the eligibility of any person to participate in benefits made available by such bureau, the official charged with the custody of such public record shall, without charge, provide the applicant for such benefits, or any person acting on his behalf, or the representative of such bureau, with a certified copy of such record."

This act clearly provides that the veteran will be furnished a free certified copy of the document on record at any time he may need the copy to comply with the requirements of the Veterans Bureau in securing any benefits which may be due him.

The act does not, however, require the clerk or any other public official to furnish more than one copy of a document in seeking to assist the veteran to obtain a particular benefit.

It might be that the veteran at some later date might return for a second certified copy of the document if it was required to obtain some entirely different benefit, but I do not believe that the Legislature intended to require clerks of circuit courts or other public officials to furnish an indefinite number of free certified copies or photostats.

Your attention is also called to Attorney General's Opinion No. 050-525 dealing with this subject.

Your question is answered in the negative.

LAWS RELATING TO VETERANS, GENERALLY

September 2, 1953.—053-226.

VETERANS—CLASSIFICATION—CIVIL SERVICE EXAMINATIONS—PREFERENCE POINTS—RESIDENCE

QUESTION: To what extent do §§295.07, 295.08, 295.09, F. S. (1947 Acts of the Legislature) modify §295.06, F. S. (a 1945 act), with regard to preference granted to veterans in civil service examinations?

To: Honorable Melvin T. Dixon, State Service Officer, St. Petersburg, Florida:

Section 295.06, F. S., grants a 10-point preference in grading the papers or otherwise determining the status of applicants for public employment to honorably discharged veterans or their widows if they have been bona fide residents of Florida for three or more years.

Section 295.07, F. S., provides for a "preference" to be given to the veterans, their wives or unmarried widows described in the act, in any certification for appointment, reinstatement, re-employment or retention in any position of public employment in Florida. A specific preference of 10 points is provided for persons described in subsections (1), (2) and (3) of §295.07, F. S., which was intended to be construed together with §295.08.

Section 295.08, F. S., provides a preference of 5 points to be given to persons described in subsection (4) of §295.07, provided "that such points shall be added only to earned ratings . . . equal to or greater than the minimum rating for qualifications. . . ." Certain other provisions are included in this section which are not material to your question.

From a reading of the above cited laws, it would appear that the Legislature intended to give the veterans described in the 1945 act (§295.06) a 10-point preference in public employment but required the veteran to be a bona fide resident of the state for at least three years.

The 1947 acts (§§295.07 and 295.08) extended the preferences granted to certain veterans and their wives or widows who had not been bona fide residents of Florida for three years.

All of the preferences granted by the different acts amount to 10 points except for the 5-point preference provided in §295.07 (4). Persons granted the 5-point preference under this section are not required to be residents of Florida for any particular period. If they had been bona fide residents of Florida for three years and were otherwise qualified, they would apparently receive the 10-point preference provided by §295.06.

Section 295.09 provides preference for promotion of veterans on the same terms as set forth in §295.07.

In conclusion, your question is answered as follows: The 1947 acts of the Legislature, §§295.07 and 295.08, did not modify the

1945 act (§295.06) except to the extent of extending the 10-point preference provided to certain additional classifications of veterans or their wives and widows who are not required to have been residents of Florida for three years as stipulated in §295.06 and to grant a 5-point preference to the classification of veteran defined in §295.07 (4), regardless of his length of residence in Florida. If a veteran falls within the classification established by §295.07 (4) but also qualifies under the provisions of §295.06, the preference to which he would be entitled would be 10 points as provided by §295.06.

October 28, 1954.—054-244.

FLORIDA MERIT SYSTEM—EXAMINATIONS—VETERANS
—DISABILITY—INFORMATION CONCERNING

QUESTION: Does the Florida Merit System have any legal authority to require a disabled veteran to furnish information concerning the nature of his disability when applying for preference in merit system examination?

To: *Hon. Angus Laird, Director, Florida Merit System:*

Chapter 295, F.S., provides various benefits, exemptions and preferences to veterans, including a mandatory preference to be given to disabled veterans in merit system examinations. I find no provision in this chapter or elsewhere in the Florida law which would authorize the merit system to compel a disabled veteran to reveal the nature of his disability. It is only necessary that he establish the fact that he has been disabled in the manner provided by law.

There is, however, nothing in this act to compel the merit system to approve for employment the application of a disabled veteran when it appears that he suffers from either a physical or mental disability which would interfere with the particular type of employment for which he is applying. I would assume that this type of information would be obtained through general questions as to his present state of health included on the general application form which the veteran would file when applying for a specific position.

Subject to the above comments, your question is answered in the negative.

CHAPTER XXI

PORTS AND HARBORS

PROTECTION OF PORTS AND HARBORS

December 1, 1954.—054-256.

GULF WAVES—JETTIES INFLUENCE CURRENT OR TIDE—GROINS—DEFINITION

QUESTIONS: 1. Do structures, commonly known as groins, which are constructed out into the gulf for the purpose of preventing or deterring beach erosion come within the meaning of jetty?

2. Do structures as above described which were erected many years ago and which are now partially destroyed come within the meaning of jetty?

To: Honorable Ray E. Ulmer, Justice of Peace, Clearwater, Florida:

Webster's New International Dictionary, second edition, describes jetty as "a pier or mole of wood or stone extended into a sea, lake, or river, to influence the current or tide or to protect a harbor; also a starling, or protecting frame of a pier." (Emphasis supplied.)

In the case of *Storm vs. Town of Wrightsville Beach*, 128 S.E. 17, 19, 189 N.C. 679, jetties have been defined as a "projection of stone or other material serving as a protection against the waves."

From the above definitions, it would appear that any kind of structure built out into a sea, lake, or river which influences the current or tide is a jetty. If structures described as groins are constructed in such manner and of such material that they effectively influence the currents or tides of the gulf, they are, in my opinion, jetties. On the other hand, if such structures as described in your second question do not effectively influence currents or tides of the gulf, they are not, in my opinion, jetties.

The above authorities and observations seem to answer both your questions.

HARBOR MASTERS FOR CERTAIN SPECIFIED PORTS

December 23, 1953.—053-336.

HARBOR MASTER—JURISDICTION—PORT OF PENSACOLA

QUESTION: Is the jurisdiction of the Harbor Master for the Port of Pensacola confined to the limits of the harbor and port of Pensacola or does said jurisdiction extend to all navigable waters lying in Escambia County?

To: Capt. Bennie Edmundson, Sr., Harbor Master, Port of Pensacola, Florida:

Generally speaking, a port is a place, urban in character, *contiguous to navigable waters*, with harbor facilities, for the lading, unloading, servicing, outfitting, and provisioning of vessels. A harbor is a place on navigable waters, where vessels may resort for safety. (48 Am. Jur. 150, Sec. 223).

Section 313.01, F. S., 1951, is a general provision providing for the appointment of all harbor masters required for the several ports of this state. Section 314.01 provides for the appointment of *one harbor master for each port* in the State of Florida into which have come, during the past five years, vessels of 500 tons burden and upwards. The pilot commissioners under the provisions of §310.01, F. S., are appointed for each county in the state in which a port is located. Although the Board is appointed for the county in which the port is located, the harbor master is appointed for each port and his duties extend to only that port. The law does not extend the authority of the harbor master over all the navigable waters of the county in which his port is located. Your authority pertains only to the duties prescribed by law as harbor master for the port of Pensacola and does not include all the navigable waters of Escambia County.

Therefore, in the absence of specific laws defining and setting forth a definite boundary of a port it appears that you have authority and duties solely in connection with the specific port, and navigable waters having no direct bearing to the port or waters not contiguous to the port are beyond the scope of your appointment.

CHAPTER XXII

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS

October 27, 1953.—053-293.

MOTOR VEHICLES—TRANSPORTATION ON HIGHWAYS— MAXIMUM WEIGHT

QUESTIONS: 1. Under the provisions of Ch. 317, F. S., and Ch. 28239, Laws of Florida, Acts of 1953, what is the maximum weight, both axle and gross weight, that may be transported over the highways of the State of Florida by a motor vehicle equipped with more than three axles designed for the transportation of gasoline, fuel oil and other liquids and measuring forty-five feet between the first and last axle of the vehicle or combination of vehicles?

2. What is the maximum weight, both axle and gross weight, that may be transported over the highways of the State of Florida by a motor vehicle or combination of vehicles manufactured after January 1, 1950, and designed to transport motor fuels and other liquids whose distance between the first and last axle of said vehicle or combination of vehicles is thirty-nine feet?

3. What is the maximum load, both axle and gross load, that may be transported over the highways of this state by a motor vehicle or combination of vehicles having more than three axles and being in existence during the year 1949 and specially registered under the provisions of §3 of Ch. 28239, Acts of 1953?

4. What is the maximum weight capacity, both axle and gross, that may be carried by a fuel oil and gasoline truck under the provisions of §3 of Ch. 28239, Acts of 1953?

To: Honorable H. N. Kirkman, Director, Department of Public Safety:

In 1949 the legislature of the State of Florida enacted Ch. 25342, commonly referred to and known as "The Motor Vehicle Safety Law," and it is codified in §317.73 through and including §317.96, F.S.A. The constitutionality of that law was upheld in the case of *Youngblood v. Darby* (Fla.), 58 So. 2d 315. Under the terms of the 1949 statutes, motor vehicles and combinations of vehicles were allowed to transport over the highways of this state maximum gross loads determined by the distance in feet between the first and last axles of the motor vehicles or combinations of vehicles as indicated in a table in §317.77, F.S.A. All vehicles were limited to 18,000 pounds per axle plus 10% scale tolerance, and penalties for overweight were based on a graduated scale per pound determined upon the amount of overweight on each particular vehicle.

The legislature specifically provided in §317.96 that motor ve-

hicles which conform to the requirements of prior laws and which could not be made to meet the axle requirements without excessive expense to the owner could be re-registered for the years 1950-51-52 and '53, but that those motor vehicles or combinations of vehicles could in no instance carry maximum loads in excess of 60,000 pounds plus 10% scale tolerance, and provided further that they were to be given a specially issued license by the motor vehicle commissioner.

In 1953 the legislature enacted Ch. 28239, which enactment amended §317.77, 317.80 and 317.96. The amendment in effect increased the axle weight from 18,000 pounds to 20,000 pounds per axle plus 10% scale tolerance, which means that the limit that any motor vehicle or combination of vehicles may carry on any one axle is 22,000 pounds. Section 317.80 was amended to provide a method for the state to foreclose on its lien that attaches to a motor vehicle when overloaded in this state, and provides that the penalty for any overload is 5¢ per pound, the minimum penalty for any overload being \$5.00.

Thus, all motor vehicles and combinations of vehicles as to weights, both gross and axle weights, are not limited to 20,000 pounds per axle plus scale tolerances, and as to gross weights to the scale provided in the table in §317.77 F. S., plus scale tolerances, with the exception of two classes. Those two classes are old vehicles which were allowed to be reregistered under the provisions of §317.96 of the 1949 act, and dump trucks, concrete mixing trucks, fuel oil and gasoline trucks designed and constructed for special type work and use. In other words, trucks of a short coupled design. We shall discuss the two classes in detail later in this opinion.

With this preface, your questions are answered in their respective order as follows:

1. A motor vehicle equipped with more than three axles designed for the transportation of gasoline, fuel oil and other liquids, and measuring forty-five feet between the first and last axle of the vehicle or combination of vehicles, is not a fuel oil truck under the provisions of §3 of Ch. 28239, Laws of 1953, but rather falls under the definition of truck, tractor, and semi-trailer, and therefore the maximum load which said motor vehicle can transport over the highways of this state shall not exceed 20,000 pounds per axle plus 10% scale tolerance or 22,000 pounds per axle and shall not exceed 64,650 pounds gross weight plus 10% scale tolerance or 71,115 pounds.

2. A motor vehicle manufactured after January 1, 1950, and designed to transport motor fuels and other liquids whose distance between the first and last axle of said vehicle or combination of vehicles is thirty-nine feet must meet the requirements of the bridge formula (the table in §317.77, since it does not come within the exception of §3 of Ch. 28239), and therefore the maximum axle weight that said motor vehicle or combination of vehicles can transport over the highways of this state shall not exceed 20,000 pounds plus 10% scale tolerance or 22,000 pounds and the maximum gross weight shall not exceed 60,000 pounds plus 10% scale tolerance, or a total gross weight of 66,011.

3. A motor vehicle or combination of vehicles having more than three axles and being in existence during the year 1949 and specially registered under the provisions of §3 of Ch. 28239, Acts of 1953, may carry an axle load not to exceed 20,000 pounds plus 10% scale tolerance, or 22,000 pounds total axle load, and may carry a gross maximum load not to exceed 70,000 pounds including scale tolerance. This will apply regardless of the type of commodity that this specific and specially registered motor vehicle or combination of vehicles may transport.

4. In considering the amount of weight or load that may be transported by dump trucks, concrete mixing trucks, fuel oil and gasoline trucks designed and constructed for special type work or use, we must refer to the definitions found in §317.74, F. S., which defines a truck as "every motor vehicle designed, used, or maintained primarily for the transportation of property." That section also defines a semi-trailer as being "every vehicle without motive power, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle."

Thus it is clear that dump trucks, fuel oil trucks, etc., as used in the 1953 act mean single unit motor vehicles with three axles or less, and these motor vehicles may not transport loads over the highways of the State of Florida in excess of 20,000 pounds plus 10% scale tolerance on any one axle.

You will note that all motor vehicles and combinations of vehicles transporting persons or goods over the highways of this state, are limited to 550 pounds per inch width of tire surface plus the 10% scale tolerance. In effect this requirement merely requires large motor vehicles or combinations of vehicles to use large size tires to prevent injury to the roads.

June 10, 1954.—054-141.

MUNICIPALITIES—MOTOR VEHICLES—TRAFFIC VIOLATIONS

QUESTION: In view of the provisions of §317.04 (1) is an offense committed when the provisions of §§317.40, 317.41, and 317.42 are violated at intersections or upon state highways but within the corporate limits of a municipality?

To: *Honorable Keith E. Collyer, County Prosecutor, Highlands County, Avon Park, Florida:*

From Section 317.04 (1), it is clear that the provisions of Ch. 317, (other than §§317.07-317.21) do not apply to a municipality unless "specifically referred to in a given section". I find nothing in the wording of §§317.40-317.42 referring either directly or indirectly to municipalities.

The term "municipality" is not specifically defined in this Chapter; however, a municipality may be defined as a legal entity consisting of population and defined area, with such governmental functions and also corporate, public improvement authority as may

be conferred by law in a charter or other legislative enactment under the Constitution. (See *City of Tampa v. Easton*, 145 Fla. 188, 198 So. 753).

Thus, the term "municipalities" referred to the questioned Chapter refers to incorporated areas.

Your question is answered in the negative.

July 15, 1954.—054-174.

STATE HIGHWAY PATROL—POLE TRAILERS—BRAKES—
REQUIREMENTS UNDER CH. 317, F. S.

QUESTION: Under the laws of this State may the Florida Highway Patrol under the provisions of Ch. 317, F. S., require brakes on pole trailers when said trailers have a gross weight of 3000 pounds or more?

To: Colonel H. N. Kirkman, Director, Department of Public Safety, TALLAHASSEE:

Section 317.01, Subsection (17), F. S., defines a pole trailer as follows:

"Every vehicle without motive power designed to be drawn by another vehicle and attached to the towing vehicle by means of a reach, or pole, or by being boomed or otherwise secured to the towing vehicle, and ordinarily used for transporting long or irregular shaped loads such as poles, or structural members capable, generally, of sustaining themselves as beams between the supporting connections."

It will be noted that Subsection (12) of §317.74, F. S., defines pole trailers in exactly this same language, and while definitions in §§317.01 and 317.74, F. S., make a distinction between a trailer, semi-trailer and pole trailer, they are all portions of motor vehicles or combinations of vehicles when traveling the highways of the State of Florida.

Section 317.50, Subsection (4), requires certain additional safety equipment on semi-trailers having a gross weight in excess of 3000 pounds, and §317.50, Subsection (5) requires additional safety equipment on pole trailers in excess of 3000 pounds gross weight.

Section 317.61, F. S., has to do with the required brake equipment on motor vehicles. Subsection (1) of §317.61 provides as follows:

"Every motor vehicle, other than a motorcycle, when operated upon a highway shall be equipped with brakes adequate to control the movement of, and to stop and hold, such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels."

Clearly this language takes in a motor vehicle towing a pole trailer and it will be noted that the only exception made as to motor vehicles is for a motorcycle and Subsection (2) deals with motorcycles especially. Subsection (3) of §317.61 provides as follows:

"Every trailer or semi-trailer of a gross weight of three thousand pounds or more, when operated upon a highway shall be equipped with brakes adequate to control the movement of, and to stop and to hold, such vehicle; and so designed as to be applied by the driver of the towing motor vehicle from its cab; and said brakes shall be so designed and connected that in case of an accidental breakaway of the towed vehicle the brakes shall be automatically applied."

It is my opinion that the language "every motor vehicle" used in Subsection (1), supra, with the exception of motorcycles and the language "every trailer or semi-trailer of a gross weight of 3000 pounds or more" used in Subsection (3) of §317.61 must be read in para materia, and that the language "every trailer or semi-trailer of a gross weight of 3000 pounds or more" used in Subsection (3), supra, takes in all types of trailers that weight in excess of 3000 pounds including a pole trailer, and thus all trailers that fit into this category must meet the test here laid down.

Therefore, it is my opinion that your question is properly answered in the affirmative.

August 3, 1954.—054-185.

FLA. HIGHWAY PATROLMEN—AUTHORITY—ACCIDENT
VICTIMS—REMOVING BODIES WITHOUT
NOTIFYING CORONER

QUESTION: Is a Florida Highway Patrolman permitted to have bodies of highway accident victims removed without first having called the Justice of the Peace or coroner?

To: *Honorable E. P. DeFriest, Jr., Justice of Peace, Fort Pierce, Florida:*

There does not appear to be a statutory provision either authorizing or forbidding the above practice. However, in defining the duties of the various peoples involved, the Florida Statutes prescribe the following:

1. As to the duty of the driver of the vehicle involved in an accident resulting in death to any person, §317.12, prescribes that the driver immediately give notice of the accident to the office of the county Sheriff or the nearest office or station of the Florida Highway Patrol. The same section of the statute also seems to point out that in case a coroner or similar officer were to have information of such an accident, he should immediately notify the Department of Public Safety.
2. Some of the duties of a highway patrolman, as prescribed by §321.05, are, besides the obvious control and regulation of traffic on state highways, that he investigate traffic accidents and while so doing, secure testi-

mony of witnesses and persons involved and to make a report thereof. His duties also require that he regulate and direct traffic concentrations and congestions.

From the foregoing, it would appear that a Sheriff or a member of the highway patrol are the proper officials to be called and who will take charge, when a death results from an automobile accident on a highway.

3. As to the duties of a Justice of the Peace or coroners as pertaining to inquests, Ch. 936, is controlling. The first section of this chapter allows that Justices of the Peace shall be deemed coroners to the extent of holding inquests in their districts. Section 936.02 allows when an inquest may be taken and these are (1) for all violent, casual and sudden deaths where there are no eyewitness or eyewitnesses to the killing or cause of death; (2) for all sudden deaths in state, county and municipal institutions, without an attending physician; (3) for "all dead bodies found within the county, whether of persons known or unknown, when there are no known eyewitness or eyewitnesses and it is apparent, from the body or the surrounding circumstances, that death was caused by some criminal act or was the result of criminal negligence, or when the deceased died or disappeared under circumstances indicating foul play;" and (4) "when ordered by a court of record having jurisdiction of felonies, upon petition of the prosecuting attorney thereof." However, a *preliminary inquiry* for an inquest by this type of official is controlled by §936.03, which seemingly only authorizes this type of inquiry when the official knows or is informed that the dead body of any person, supposed to have come to his death under any of the circumstances mentioned in (1), (2) or (3) above has been found in his district. This same section goes on and imposes upon the coroner or Justice of the Peace acting as coroner the duty to investigate the facts and circumstances of death; ascertain names and addresses of all persons having knowledge thereof, and report the same to the judge or prosecuting attorney of any court in the county having trial jurisdiction of felonies. If either the judge or prosecuting attorney deem it necessary either shall direct the coroner to summon a coroner's jury and that an inquest be held.

Admitting that a Sheriff or highway patrolman are the proper officials to be first called to the scene of the accident, which accident has resulted in death to one, some or all persons involved (F.S., §317.12) and admitting that this official, if a highway patrolman, is obligated to secure testimony of witnesses and make a preliminary investigation (F.S., §321.05), there may arise a situation where the proper official to assume the obligations of a preliminary inquiry be a coroner or a Justice of the Peace acting as a coroner (as per §936.03).

From the foregoing, the following opinions are hereby ren-

dered for the various types of situations which may arise from a dead body being found at the scene of an automobile accident:

1. When a highway patrolman, called to the scene of the accident has determined, from his preliminary investigations and testimony secured from an eyewitness or eyewitnesses, that the cause of death was a result of the accident, has ordered the body or bodies removed, he may not be exceeding his authority in so ordering.
2. If this same official cannot determine the cause of death or if there be any doubt, because of a dearth of witnesses or a lack of an eyewitness or because of some uncertainty peculiar to the circumstances, he should immediately call the coroner or the Justice of the Peace of the district and should not take it upon himself to have the body or bodies removed, as this would considerably hinder the preliminary inquiries and investigations which the coroner would have to make.
3. A third situation may also arise and that is where a highway patrolman, taking charge at an auto accident from which a death or deaths may have resulted, but being unable to make the proper determinations of cause of the death or deaths has called a coroner, and while so waiting for his arrival, has observed that this delay of removing the body or bodies strewn on the highway has created much traffic congestion or perhaps even a complete stoppage of traffic on the highway. In this example, the decision which the highway patrolman will have to make should be determined by weighing the exigencies of the traffic situation against the necessity that the coroner, upon his arrival, find the bodies unmoved.

In view of the above, I call to your attention a very sound and wise policy which has already been instituted in some counties of this state and that is the cooperation between the highway patrolmen and the coroners or Justices of the Peace to notify each other of such accidents and whenever possible to have both a highway patrolman and the coroner or Justice of the Peace of the district present at the scene of an automobile accident where a dead body is found.

July 27, 1954.—054-177.

**HIGHWAY PATROL OFFICERS—ARRESTS—SUMMONS—
VIOLATION OF CH. 317, F. S.—COUNTY JUDGE'S DUTY**

QUESTION: Where a highway patrol officer apprehends a person on the highway accused of violating one or more of the provisions of Ch. 317, F. S., and releases the violator on condition he complies with a ticket named a "summons", to report to the sheriff's office at a later date for posting of bond, under the statutes and laws of Florida is it the duty of the county judge to issue a warrant to the sheriff for the person so accused where the accused voluntarily comes into the sheriff's office and makes bond?

To: Honorable Lawrence Renfroe, County Judge, Tallahassee:

The only purpose of issuing a warrant is to have it served so as to procure the presence of the defendant before the court, and it is wholly unnecessary to issue a warrant to the sheriff after the sheriff has already accepted a bond from the defendant to secure his appearance, although, of course, if the defendant should fail to appear as required by his bond it would be proper to issue a *capias* for him. If a warrant were issued to the sheriff, it would be his duty to execute it by arresting the defendant and I see no reason for such an arrest after the defendant has already made bond to meet the charge. It would be an idle and useless gesture to issue an arrest warrant as a mere matter of formality.

Therefore, in my opinion your question is properly answered in the negative.

TITLE CERTIFICATES

September 2, 1953.—053-227.

MOTOR VEHICLES—TITLE CERTIFICATES—ACCEPTANCE AND NOTATION OF LIENS—§319.27, F. S.

QUESTION: Is the acceptance and recordation of notices of lien upon motor vehicles by this Department since August 1, 1949, as outlined and directed by the provisions of §319.15, F. S., 1941, as amended by Chapters 23658, Laws of 1947, and 25150, Laws of 1949, authorized under motor vehicle laws in effect prior to July 1, 1953, in any way or manner other than by notation and endorsement of lien upon the face of the official certificate of title?

To: Honorable E. V. Fisher, Motor Vehicle Commissioner:

The question presented is answered in the negative.

The copies of former official opinions rendered on March 12, 1952, and June 17, 1952, have no connection whatsoever with or relation to the question now submitted. Both of the said opinions, copies of which you attach to your request, relate only to the questions as to whether liens on motor vehicles may be lawfully filed with the Motor Vehicle Commissioner at any place or location other than in the official office of the Motor Vehicle Commissioner, located by statute at the capitol in the city of Tallahassee. They do not deal with the factual situation under which liens may be accepted and recorded.

Chapter 319, F. S., 1941, was amended by Ch. 23658, Laws of 1947, to read in part as follows:

"Section 8. The provisions of Section 28.22 and Section 319.15 of the Florida Statutes 1941, shall never be construed to apply to or to permit or require the Notice of Lien deposit, filing or other record whatsoever of a chattel mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or similar instrument, or any copy of the same, made hereafter and covering

a motor vehicle. Any mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or other similar instrument made after the effective date of this Act and covering a motor vehicle required to be registered, if a notation of the lien or encumbrance has been made by the Commissioner on the face of the Certificate of Title for such vehicle, shall be valid as against the creditors of the mortgagor whether armed with process or not and subsequent purchasers, mortgagees and other lien holders or claimants but other wise shall not be valid against them. All liens, mortgages and encumbrances noted upon a Certificate of Title shall take priority according to the order of time in which the same are noted thereon by the Commissioner...."

and further amended to read as follows:

"... The provisions of Section 28.22 and Section 319.15 of the Florida Statutes, 1941 shall continue to apply to the Notice of Lien, deposit, filing, re-filing, or other record whatsoever of a chattel mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or other similar instrument or any copy of same, made prior to the effective date of this Act and covering a motor vehicle, unless and until the indebtedness evidenced by such Chattel Mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or other similar instrument, or any copy of same, has been noted by the Motor Vehicle Commissioner on the Certificate of Title provided for by this Act."

This statute became effective by its terms on October 1, 1948. The same provisions were re-enacted by the legislative session in 1949 by the enactment of Chapter 25150, Laws of 1949, which became effective by its terms on August 1, 1949.

Since the first day of October, 1948, §319.15, F. S., has been ineffective as to any and all liens created subsequent to that date. Upon the effective date of the Act of 1947 the office of the Motor Vehicle Commissioner ceased to be an office of record for the receipt and recording of liens except for the purpose of noting or endorsing the same upon the face of the official certificate of title issued by the Motor Vehicle Commissioner. This construction was placed upon the Acts of 1947 and 1949 by the Supreme Court of Florida in the case of *Livingston vs. National Shawmut Bank of Boston* which was decided in December, 1952. A somewhat abortive effort was made by the Legislature during the 1953 session by qualifying the statutes in this regard as to certain specified transactions through which liens are created, but that Act did not take effect until July 1, 1953, and had no application to transactions had prior to that date. The acceptance and notation of liens during the period of time from October 1, 1948, to July 1, 1953, was governed by the provisions of Section 319.27.

October 7, 1954.—054-231.

HOUSE TRAILER—SALE—TITLE CERTIFICATE
—TRANSFER

QUESTION: Does the law require that the vendor of a house trailer deliver to the purchaser of such trailer a title certificate at the time of sale?

To: *Honorable Ray E. Ulmer, Justice of Peace, Clearwater, Florida:*

Section 319.20, F.S., contains the following provision:

"For the purposes of this Act the term 'Motor Vehicle' shall also include a . . . trailer-coach. For the purposes of this law . . . 'Trailer-Coach' means any trailer or semi-trailer so designed and equipped as to provide living and/or sleeping facilities and drawn by a motor vehicle. . . ."
Section 319.21, F.S., provides as follows:

"No person hereafter shall sell or otherwise dispose of a motor vehicle without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser . . ."

Section 319.34, F.S., provides that:

"Whoever shall, except as otherwise provided for in this law, purport to sell or transfer a motor vehicle without delivery to the purchaser or transferee thereof a certificate of title thereto duly assigned to such purchaser as provided in this law . . . shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both, for each offense."

Said §§319.20, 319.21 and 319.34, F.S., were originally enacted as parts of the same law, viz., Ch. 23658, Acts of 1947. Therefore, said three statutes must be considered together for the purposes of this opinion and, when so considered, it is apparent that the "motor vehicle" mentioned in §§319.21 and 319.34 includes the "trailer-coach" which is defined in §318.20, F.S.

The result is that it is unlawful to sell a trailer-coach, as defined in §319.20, without delivering a properly assigned title certificate to the purchaser.

The question then arises as to what trailer-coaches are covered by that definition. The definition of "trailer-coach" in §319.20 requires that in order for a trailer or semi-trailer to be a trailer-coach it must not only be designed and equipped so as to provide living and/or sleeping facilities but it must also be "drawn by a motor vehicle". Therefore, it is my opinion that a house trailer is a trailer-coach within said definition when such house trailer is or has been "drawn by a motor vehicle" over the public highways or streets; and that if a house trailer has not been "drawn by a motor vehicle" over the public highways or streets, it is not a trailer-coach within said definition.

I do not think that §320.29, F.S., requiring the delivery of a title certificate to the purchaser of a used or secondhand motor vehicle, has any application to house trailers, because a house trailer is not a motor vehicle within the definitions laid down by §320.01(1) and (5) to govern the construction of Ch. 320, F.S., and because the broad definition of "motor vehicle" as including "trailer-coach" found in §319.20 has no application to §320.29, these two sections having been enacted as parts of different laws at different sessions of the Legislature.

May 27, 1953.—053-111.

MOTOR VEHICLES—TRANSFERS—APPLICATION FOR
TITLE CERTIFICATES—EXTRA FEES—§§319.21,
319.23(5), F. S. APPLICABLE

QUESTION: "Is the motor vehicle commissioner authorized by law to charge an extra fee of one dollar in addition to all other fees required by law for an application for transfer of ownership of a motor vehicle filed in this office more than ten (10) days after delivery of the vehicle to the applicant when the vehicle involved

"1. is a new vehicle being certificated for the first time,

"2. has been previously certificated in Florida and is transferred by assignment or re-assignment,

"3. has been previously certificated in a foreign state and transferred by assignment or re-assignment?"

To: *Honorable Charles Knott, Deputy Commissioner:*

Section 319.23(5), F. S., provides:

"In the case of the sale of a motor vehicle by a dealer to a general purchaser or user, the certificate of title shall be obtained in the name of the purchaser by the dealer upon application signed by the purchaser, and in all other cases such certificate shall be obtained by the purchaser. *In all cases of transfers of motor vehicles, the application for certificate of title, or corrected certificate, or assignment or re-assignment, shall be filed within ten days from the delivery of such motor vehicle. An applicant shall be required to pay an extra fee of one dollar, in addition to all other fees and penalties required by law for failing to file such application within said ten days.* Licensed dealers need not apply for certificates of title for such motor vehicles in stock or where such are acquired for stock purposes, but upon transfer of same shall either give transferee a re-assignment of the certificate of title on such motor vehicle or shall make notation on the face of the application by transferee as provided in §319.21." (Emphasis supplied)

The above quoted statutory provision would appear to require that your question be answered in the affirmative in all three of the circumstances enumerated.

June 28, 1954.—054-153.

MOTOR VEHICLES—OWNERSHIP BY ENTIRETIES—
TRANSFER OF TITLE CERTIFICATE—
REQUIREMENTS

QUESTION: "In cases where a certificate of title to a motor vehicle has been issued in the names of two or more persons, for example:

- (a) to A.B. and C. D.
- (b) to A.B. and C. B. (husband or wife)
- (c) to A.B. or C. D.
- (d) to A.B. and/or C.D.
- (e) to A.B. and C. D. a copartnership

what is the legal requirement for the execution of an assignment of the certificate or a transfer to ownership of the vehicle to another person?

To: Honorable E. V. Fisher, Motor Vehicle Commissioner:

Under circumstances indicated by (a) the ownership of the persons is one in common, each being the owner of an undivided one-half interest in the vehicle. To effectuate a legal assignment of the title certificate or the transfer of ownership of the vehicle, execution of the instrument of assignment or transfer is required by both (or all) of the joint owners. Anyone may assign his *interest* in the vehicle without joinder of the others, the effect of which would be to substitute his assignee as a joint owner with the other or others.

(b) Ownership under circumstances indicated is ownership by entireties, each spouse being the owner of the vehicle in full, with right of survivorship, in the event of the death of either to the survivor. So long as the marital relationship exists, both must join in the execution of the transfer (*Rader v. First National Bank in Palm Beach*, 42 So. 2d 1; *Bailey v. Smith*, 89 Fla. 303, 103 So. 833). In the event of severance of the marital relationship other than by death, the parties become owners in common, governed by the procedure outlined in (a).

(c) Under the circumstances indicated either of the persons named may assign the certificate of transfer ownership of the vehicle, by execution of the instrument of transfer without the joinder of the other, the effect of the use of the disjunctive participle "or" being to vest each with equal power of disposition.

(d) You have advised that you receive very few requests for transfer which fall within this wording. However, the department has construed that transfer may be effected by both of those named or one of them. The term "and/or" is ambiguous, indicating uncertainty and doubt (3 C.J.S., page 1069), and has been severely criticized. While use of the term should certainly be discouraged, I believe the meaning you have placed upon it should be given weight, and is a correct application of the law.

(e) Sale by one partner of partnership property, within the scope of the business operations of the partnership, is a sale by the

partnership (Maxwell v. Flowers et al, 89 Fla. 109, 103 So. 413). However, the case does not elaborate upon what is meant by "within the scope of the business operations of the partnership." 40 Am. Jur., Sec. 179, page 254, says where a partner transfers property "not held for the purpose of trade or sale", without the knowledge and consent of a copartner, the copartner may institute an action for conversion of the property, provided the transferee is not an innocent purchaser. This same authority (page 253) states that a partner has the absolute right to sell all of the partnership effects, held in the course of trade and within the scope of the business of the firm. Hence, I think we can conclude that where the partnership's business is that of trading in motor vehicles, either partner may transfer its personal property. But where the business engaged in is other than that of trading in motor vehicles, both may be required to transfer the title. However, each partner has an equal right to the possession and control of personal property of the partnership (40 Am. Jur., Sec. 178, page 253). There is no duty upon you to attempt to determine the right and equities in a given situation. I believe execution of the instrument by one of the partners will be sufficient.

LICENSES

September 9, 1953.—053-233.

MOTOR VEHICLES—REGISTRATION AND LICENSE TAGS UNDER §320.38, F. S.

QUESTION: Should the Motor Vehicle Commissioner in connection with the issuance of a motor vehicle registration and license tag under §320.38, F. S. require that the owner thereof obtain a certificate of title to the vehicle in question pursuant to Ch. 319, F. S.

To: Honorable E. V. Fisher, Motor Vehicle Commissioner:

The provisions of Ch. 319, F. S., "apply exclusively *except as otherwise specifically provided*, to motor vehicles required to be registered and licensed under the provisions of Ch. 320 of the Florida Statutes. . . " (§319.20, F. S.). "No person hereafter shall sell or otherwise dispose of a motor vehicle without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser, nor purchase, or otherwise acquire, or bring into this state a motor vehicle, *except for temporary use*, unless such person shall obtain a certificate of title. . ." (§319.21, F. S.). "Whoever shall, except as otherwise provided for in this law, . . . operate in this state a motor vehicle for which a certificate of title is required without such certificate having been obtained in accordance with the provisions of this law. . ." is guilty of a misdemeanor (§319.34, F. S.).

Every owner, or person in charge of a motor vehicle which shall be operated or driven upon the highways of this state, or which shall be maintained in this state, is required to register the same and obtain a motor vehicle license tag (§320.02, F. S.). The

application for registration is required to show "the name, age, residence and business address of the owner of such vehicle, and also the county and state or place, if outside of the state, in which he resides." (§1, Ch. 28186, Laws of Florida, Acts of 1953).

The provisions of Ch. 320, F. S. do not apply to "motor vehicles owned by nonresidents of this state, other than a foreign corporation doing business in this state" upon the compliance with certain conditions (§320.37, F. S.); except where the owner accepts employment in this state, engages in a trade, profession or occupation, or enters his children in the public schools of this state (§320.38, F. S.). The sum and substance of these provisions is that the owner of a motor vehicle temporarily used in this state who accepts employment, engages in a trade, profession or occupation, or enters his children in the public schools of this state is required to register his motor vehicle and obtain a license tag for it, notwithstanding §320.37, *supra*.

When the above several statutory provisions are read together we feel that motor vehicles having a permanent situs in this state are required to have a title certificate (except in the hands of dealers as provided in §319.21, F. S.), as well as being registered and bear a license tag. However, where the motor vehicle has its permanent situs in another state, but is being used temporarily in this state under the conditions mentioned in §320.38, F. S. it must be registered and bear a license tag issued by this state, although a title certificate under Ch. 319, F. S., is not required. In registering a motor vehicle under §320.38, F. S., and issuing a motor vehicle tag therefor, the owner or claimant of the title thereto should be required to prove to the Motor Vehicle Commissioner that he is the owner of the vehicle and entitled to have the same registered in his name, although no title certificate is to be issued. Should it become evident, to the satisfaction of the commissioner, subsequent to the registration of the vehicle that it is not being temporarily used in Florida but has acquired a permanent situs in this state its owner should be required to obtain a title certificate to the same.

August 10, 1954.—054-196.

MOTOR VEHICLES—USE OF SERIES "M" DEALERS' DEMONSTRATION TAGS

QUESTIONS: 1. May a motor vehicle, for which a Series "M" or dealers' demonstration tag has been issued, be used by its dealer-owner to haul farm machinery and equipment from farms to the dealer's repair shop for repairs and to return same to the farm after such repairs have been made?

2. May a motor vehicle, for which a Series "M" or dealers' demonstration tag has been issued, be used by its dealer-owner for the purpose of transporting over the highway motor vehicles to his place of business for purpose of sale by him?

3. May a motor vehicle, for which a Series "M" or dealers' demonstration tag has been issued, be used by its dealer-owner, members of his family, or others, in connection with activities disconnected with the automotive business of the said dealer-owner?

To: Honorable E. V. Fisher, Motor Vehicle Commissioner:

Section 320.08, F. S., provides for dealers' demonstration or Series "M" motor vehicle licenses and license tags which, under §320.13, F. S., are "valid for use on motor vehicles owned by the registered dealer to whom such tag was issued and while being operated in connection with such dealers' business; but shall not be valid for use for hire." Said §320.13, prior to its amendment by §1, Ch. 24186, Laws of Florida, Acts 1947, provided that "dealers' tags provided in this chapter shall be void for use on motor vehicles owned by the registered dealer to whom such tag was issued while such motor vehicle is in transit from shipping point to dealer's place of business and while being demonstrated for sale; but shall not be valid for use for hire." The above quoted language used in the 1947 amendment is so materially different from the language used prior to amendment that it is apparent that the Legislature intended to extend the operation of the said dealers' demonstration tags and make them valid for use so long as the motor vehicle is operated in connection with the dealer's regular business, and not for hire. A dealer's regular business must be held to be usual and ordinary business transacted by him. It is common knowledge that motor vehicle dealers ordinarily maintain motor vehicle repair departments. A farm tractor is defined by the statutes (subsection (19), §320.01, F.S.) as a "*motor vehicle* operated principally upon a farm, grove or orchard in agricultural or horticultural pursuits . . ." It is general knowledge that many motor vehicle repair shops make it a business of repairing tractors and other farm motor vehicles and equipment in connection with their usual business. If it is the usual and ordinary practice of a motor vehicle dealer to repair or rebuild farm tractors and other farm motor equipment, then it may be said that such repairs are made in connection with such dealers' business, and it is further the usual and ordinary practice of such dealers to haul such tractors and other farm motor vehicles and equipment to and from his place of business in connection with the making of such repairs or rebuilding, then it may be further said that such hauling is in connection with his said business, so long as a charge is not made for such hauling, in which case the vehicle would be used for hire. If the motor vehicle bearing a Series "M" tag is used for the purpose aforesaid and under the conditions aforesaid it would be used in connection with the dealers' business and the first question would be answered in the affirmative, otherwise the answer would be in the negative.

Prior to the 1947 amendment Series "M" or dealers' demonstration tags could be used on motor vehicles in transit from shipping points to the dealer's place of business; this indicates that the Legislature, when it enacted the prior section, was of the opinion that the transportation of motor vehicles to the dealer's place of business for the purposes of sale was in connection with his business. If it is the usual and ordinary practice of motor vehicle dealers to transport motor vehicles to their place of business on vehicles equipped with Series "M" tags, then we feel that such practice may well said to be in connection with such dealer's business; whether or not such practice is usual and ordinary is a question of fact to be determined by the commissioner. If such practice is usual and customary among motor vehicle dealers, we feel that the second question should be answered in the affirmative, otherwise it should be answered in the negative.

The third question should on its face be answered in the negative, as the use is clearly not in connection with the dealer's business.

June 8, 1953.—053-123.

**MOTOR VEHICLE COMMISSIONER—SECONDHAND
DEALERS—LICENSE REQUIREMENTS—§320.27,
F. S. APPLICABLE**

QUESTION: Are a secondhand dealer's license certificate and dealer's registration license plates issued under the provisions of §320.27, F. S., transferable or assignable by the licensee upon the sale of his business to another person, firm or corporation to the extent of authorizing such person to conduct or carry on the business of buying, selling or dealing in used motor vehicles without securing a license certificate and registration license plates from the motor vehicle commissioner to engage in such business?

To: Honorable Charles Knott, Deputy Commissioner, Tallahassee, Florida:

Section 320.27, F. S., provides for the licensing of secondhand automobile dealers by the State Motor Vehicle Commissioner.

Subsection (2) of §320.27 provides certain requirements for applicants for this type of license, including a sworn statement from the applicant as to how the business is to be operated and sworn statements by two other reputable persons certifying to the good moral character of the applicant. Various other requirements are provided which could apply only to the individual or company making the application indicating that this license is regulatory in nature at least to the extent of providing the Motor Vehicle Commissioner with authority to determine the qualifications of the applicant to conduct the proposed business properly. It would seem clear that if this type of license were transferable the intent of the above act would be nullified since the Motor Vehicle Commissioner would be deprived of any opportunity to consider or investigate the qualifications of the licensee.

It is the general rule that a license may not be transferred unless the license statute or ordinance provides otherwise (53 C.J.S. 657, sec. 45). The regulation considered here contains no provision for transfer either with or without the consent of the issuing authority, i.e., the Motor Vehicle Commissioner.

It is my opinion, therefore, that your question must be answered in the negative.

July 17, 1953.—053-153.

**MOTOR VEHICLES—TRANSPORTATION—USE OF
DEALER'S TAG—VALIDITY**

QUESTION: Can a licensed dealer, to whom a dealer's tag has been issued, lawfully use such tag on a motor vehicle operated for the purpose of transporting new motor vehicles from the factory to the dealer's place of business in Florida, when such vehicle and the new vehicles being transported are owned by such dealer?

To: Hon. Charles Knott, Deputy, Office of Motor Vehicle Commissioner, Tallahassee, Florida:

Section 320.13, F. S. provides in part: "... Dealers' tags provided in this chapter shall be valid for use on motor vehicles owned by the registered dealer to whom such tag was issued and while being operated in connection with such dealer's business, but shall not be valid for use for hire."

Although the legislature may not have intended to authorize dealers to use dealers tags for the purpose contemplated in your question, it did not prohibit such use in the statute and I do not feel that such intent can be read into the act, in the absence of a judicial determination of the question. Since the question has not to my knowledge been considered by the courts, I believe that until such time as it may be resolved by a court of competent jurisdiction, that your question must be answered in the affirmative.

August 7, 1953.—053-193.

AUTO TRANSPORTATION COMPANIES—COMMERCIAL
VEHICLES—SEMI-ANNUAL REGISTRATION—
§320.07(1), F. S.

QUESTION: Should the provisions of Paragraph (1), §320.07, F. S., continue to apply to the registration of commercial vehicles used by automobile transportation companies in their business on a semi-annual basis after the effective date of §3, Ch. 28186, Acts of 1953, which amends §320.08, F. S., by deleting Paragraph 3 of that section and substituting therefor a new paragraph which provides for both for hire and private trucks to be registered under the same series license tag at the same rate per cwt.?

To: Honorable Charles Knott, Deputy Motor Vehicle Commissioner:

Section 320.07, F. S., as amended by the 1953 Legislature, provides in part, "... Provided however, that auto transportation companies may register semi-annually the commercial motor vehicles used by them in their business. . ."

Section 320.08, F. S., as amended by the 1953 Legislature, provides in part, "... Tractors and trucks for commercial use 'Cv' series: both private and for hire. Net weight more than 5,000 pounds: \$1.10 per cwt."

It is apparent from the above cited provisions that the law relating to semi-annual registration of commercial vehicles was not changed by the 1953 Legislature except as to the rate of the amount of the license fee charged and the designation of the tag to be issued.

Under the present law the same rate of license fee is charged for both private and for hire commercial trucks of the CV series of classification. Provision is made by §320.07 for semi-annual registration of for hire trucks (automobile transportation companies), but no similar provision for semi-annual registration is made for privately operated trucks of the same classification. The 1953 amendment did not alter the previous provisions of §320.07 in this regard.

In view of the above, your question is answered in the affirmative.

March 9, 1953.—053-53.

MOTOR VEHICLE LICENSES—NONRESIDENT FISHERMEN—§320.38, F. S.

STATEMENT:

and

QUESTION:

Several fishermen live in Georgia but work on boats which fish on the open seas out of Ft. Myers. They receive their pay when the boats reach Ft. Myers and depart for Georgia after each trip for about ten days.

Under these circumstances, you request an opinion on the following question:

Are fishermen as described above required to buy a Florida license for their automobiles?

To: *Honorable Frank A. Pavese, Prosecuting Attorney, Lee County, Fort Myers, Florida:*

Section 320.38, F. S. provides, in part:

"... In every case where a nonresident shall accept employment, or engage in any trade, profession or occupation in the State of Florida, or shall enter his children to be educated in the public schools of the State of Florida, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the State of Florida."

I assume from the facts which you have submitted that the fishermen in question are employed by a fishing concern operated in Ft. Myers and that the fishing boats in question make Ft. Myers their home port or base of operations. In this event, the fact that the actual fishing performed by the employees is on the high seas would not alter the fact that they had accepted employment in Florida from a Florida employer as contemplated by §320.38, F. S.

If, however, the employer of the fishermen was not a Florida concern and the boat on which they work merely puts into Ft. Myers periodically for the convenience of its crew for the purpose of allowing said crewmen to visit their homes in various parts of the country, it would appear that they were not employed in Florida and that the above quoted law would not require them to buy a Florida license for their automobiles.

Subject to the above discussion and reservations, your question is answered in the affirmative.

November 13, 1953.—053-306.

NONRESIDENTS—MOTOR VEHICLES—LICENSE REQUIREMENTS—EXEMPTIONS

QUESTION: Is a Florida license required on a motor ve-

hicle owned by a nonresident of Florida but which is used by a member of his family to drive to and from work in Florida?

To: Honorable E. V. Fisher, Motor Vehicle Commissioner:

Your attention is directed to the provisions of §320.37 and 320.38, F. S. Said sections relate to the registration and display of license plates for motor vehicles in Florida and exempt nonresidents unless said nonresidents accept employment in Florida or enter children in Florida schools.

I also call to your attention an opinion which I issued on March 2, 1951, to the Honorable A. C. Simmons, County Prosecuting Attorney, Ft. Pierce, Florida (AGO 051-45). In this opinion I stated, "when the foreign automobile is legitimately in this state and the owner is also present in this state and has merely loaned his automobile to someone to use temporarily, it is my opinion that such vehicle would not require a Florida license plate. If, however, it is made to appear that the owner of said vehicle is not in this state or that the use of the automobile is the result of a plan or scheme to avoid the provisions of §320.38, F. S., then, of course, a Florida license plate would be required."

I think the above quoted opinion answers your question, at least in part. In other words, in order for you to compel a nonresident to license his automobile in Florida, you would have to establish the fact that its primary use was by a Florida resident or by a person employed in Florida or whose children were enrolled in Florida schools and that the use of an out-of-state license was a subterfuge designed to circumvent the Florida licensing laws.

In this connection I might add that in the case of State of Florida vs. Edward J. Granger, (case No. 8412-M-Criminal), the Honorable Geo. W. Whitehurst, U. S. District Judge for the District Court, Southern District of Florida, Miami Division, ruled in April of 1953 that a nonresident serviceman stationed in Key West did not have to purchase a Florida license plate for his car even though his wife was employed in Florida and drove the car to her work.

Your question is best answered as follows: a nonresident serviceman stationed in Florida would not have to buy a Florida license under the circumstances described in your question. In the case of civilian nonresidents, I believe that each case would have to be examined closely on its own merits and that there must be a clear showing that the use to which the vehicle is put amounts to an evasion of §320.38, F. S., before the nonresident owner of the automobile could be compelled to buy a Florida license.

Previous opinions of this office Nos. 047-63, 053-233, 052-293 and 051-45 are modified and revised in so far as they may be in conflict with the above.

HIGHWAY PATROL

January 5, 1954.—054-1.

DEPARTMENT OF PUBLIC SAFETY PENSION FUND— RETIRED MEMBER—REEMPLOYMENT

QUESTION: May an employee who has retired from the Department of Public Safety of the State of Florida accept employment with the State, or a political subdivision of the State of Florida, in an appointive or elective capacity, without forfeiting his retirement pay?

To: Colonel H. N. Kirkman, Director, Department of Public Safety:

The Department of Public Safety Pension Fund created under and established in accordance with the provisions of §321.15, F. S., is administered by the Director of the said Department of Public Safety under the supervision of the Executive Board of the Department of Public Safety (§321.16, F. S.). Every member of the Department of Public Safety who has subscribed to the constitutional oath of office shall come under the provisions of the Department of Public Safety Pension Fund Law and shall contribute to the fund every month six percentum of his monthly salary (§321.17, F. S. as amended by Ch. 28121, Laws of Florida, Acts of 1953). Requirements for retirement (age, length of service, disability, etc.) are provided for in §321.18, F. S. and the retirement pay basis is set forth in §321.20, F. S.

Chapter 121, F. S. which relates to the State Officers and Employees Retirement System contains a section which relates to the employment after retirement of state officers and employees. Section 121.14, F. S., as amended by Ch. 28258, Laws of Florida, Acts of 1953, provides as follows:

“(1) Any person who has accepted and is receiving retirement compensation under this chapter shall have such compensation suspended during any period of reemployment in any capacity whatsoever by the State of Florida or any department, branch or agency thereof. Any person receiving retirement compensation under this chapter who becomes reemployed by the state shall furnish timely notice in writing to the agency by which he is becoming employed and to the comptroller of the fact that he is prohibited from receiving retirement compensation and salary at the same time and should he fail to do so, and should he receive and retain both benefits and compensation, he shall forfeit all of the benefits of this chapter forever.

“(2) The reemployment by the state of Florida or any department, branch, or agency thereof, of any person who has accepted and is receiving retirement compensation under this chapter shall have no effect on the average final compensation or the aggregate number of years of service of such person, nor shall any deductions for retirement contributions be made from the salary paid such person with respect to such reemployment.”

Section 134.14, F. S., as amended by Ch. 28258, Laws of Florida, Acts of 1953, relates to the employment after retirement of county officers and employees, and is for all practical purposes identical to said §121.14 relating to the employment after retirement of state officers and employees.

The Department of Public Safety Pension Fund Law does not contain any provision, similar to that found in the State Officers and Employees Retirement Law or the County Officers and Employees Retirement Law, which prohibits employees of the Department of Public Safety who have retired from accepting employment with the State of Florida, or a political subdivision of the State, in either an appointive or elective capacity without forfeiting his retirement pay. Furthermore, the members of the Department of Public Safety of this State are *specifically exempted* from the provisions of Ch. 121, F. S., (§121.16, F. S., as amended by Ch. 28122, Laws of Florida, Acts of 1953).

Since the right of a public officer or employee to a pension depends exclusively upon statutory provisions therefor, it is obvious that the existence and extent of such right in particular instances is determinable primarily from the terms of the statute under which the right or privilege is granted, and it further follows from this general premise that the right to a pension may be made to depend upon such conditions as the grantor thereof may see fit to prescribe. Hence where the statute under which the pension is granted provides for forfeiture or suspension of a retirement pension granted to a public officer or employee in case he should accept employment by the government of the state or one of its political subdivisions, such statute will effectively forfeit or suspend the payment of the pension in case the contingency happens. On the other hand, where the statute does not contain such a clause, the acceptance of public employment by a retired public servant has no effect whatsoever on his pension right unless he is found to have waived such right.

It has been held in the following cases under statutes not forbidding either expressly or by implication the reentry into public employment of a public officer or employee retired with a pension that a subsequent reemployment does not operate as a revocation or suspension of the pension granted: *Jackson v. Otis*, 66 Cal. App. 357, 225 P. 890; *Lamb v. Boone*, 237 Iowa 273, 21 N.W. 462, 162 A.L.R. 1465; *Mattson v. Flynn*, 216 Minn. 354, 13 N.W. 2d 11; *State ex rel Herman v. Grand Island*, 145 Neb. 150, 15 N.W. 2d 341; *People ex rel Mulvey v. York*, 59 N.Y.S. 735; *Mulvey v. Waldo*, 140 N.Y.S. 988; *Homan v. Mackey*, 295 Pa. 82, 144 A. 897; *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130.

A reentry into public employment by a retired public officer or employee can be achieved by him by accepting employment either from the same political unit by which he has been employed previously or by accepting employment from a different political unit with which the pensioner has had no previous connection. In the majority of the cases this distinction seems to have played no roll in reaching a decision but there are dicta in

some of the cases which indicate that such distinctions may be of importance under certain circumstances. Wherever such distinction is made there is a tendency toward a more lenient view in regard to employment by a different political unit than in regard to a reemployment by the same one (162 A.L.R. 1470).

Under statutes which either expressly or by implication make the acceptance of public employment a bar to receiving a pension the reentry into public employment by a public officer or employee retired with a pension operates as a revocation or suspension to the pension granted and has been so held in the following cases: *Stiles v. Police Pension Fund*, 281 Ill. 636; 118 N.E. 202; *Turner v. Passaic Pension Commission*, 10 N.J. Mis. R. 1270, 163 A. 282; *Cox v. McElligott*, 298 N.Y.S. 805; *Jones v. Valentine*, 298 N.Y.S. 802 (affirmed without opinion in 276 N.Y. 585, 12 N.E. 2d 589); *Grieble v. Firemen's Pension Fund*, 105 Pa. Super. Ct. 510, 161 A. 588).

Inasmuch as the Department of Public Safety employees are not prohibited by the retirement act of that Department from accepting employment after retirement with the state or one of its political subdivisions, and in view of the fact that such Department of Public Safety employees are specifically exempted from the provisions of the State Officers and Employees Retirement Act (§121.14, as amended) which requires that any person receiving retirement compensation under that chapter who becomes reemployed by the state or any department, branch, or agency thereof, shall have such retirement compensation suspended during any period of such reemployment in any capacity whatsoever by the state or any department, branch, or agency thereof, it seems clear that a retired member of the Department of Public Safety may accept employment with the state or a political subdivision thereof in an appointive or elective capacity without forfeiting his retirement pay.

It may be argued that it is possible that by continual service, the claimant might in time to come acquire a right to still another pension in case of reemployment by the state or a political subdivision thereof. The Department of Public Safety Retirement System does not prohibit a person from drawing two separate pensions. Furthermore, most, if not all, of our state retirement systems require that all officers and employees contribute a certain percentage of their monthly salary or income to the retirement system which their employment would normally make them members. Section 121.14, F. S., provides that the reemployment by the State of Florida or any department, branch or agency thereof of any person who has accepted and is receiving retirement compensation "under this chapter" shall have no effect on the average final compensation or the aggregate number of years of service of such person nor shall any deductions for retirement contributions be made from the salary paid such person with respect to such employment. A similar provision is found in the County Officers and Employees Retirement Act.

However, these provisions apply only to officers and employees retired under the State and County Officers and Employees Re-

tirement Acts. Inasmuch as members of the Department of Public Safety are specifically exempted from the provisions of the State Officers and Employees Retirement Act, it would seem that a retired member of the Department of Public Safety may, by being reemployed in another department of government, become eligible to participate in two "public" pension plans. In view of the fact that public pension plans are creatures of the Legislature it would seem that any argument that it is against public policy for persons to participate in two public pension plans should be addressed to the Legislature.

The question should, we think, subject to the foregoing observations, be answered in the affirmative.

August 10, 1954.—054-194.

TAXATION—FLORIDA HIGHWAY PATROL STATIONS EXEMPT

QUESTION: Are Florida Highway Patrol stations and the lands upon which constructed subject to county or municipal ad valorem taxation?

To: Honorable H. N. Kirkman, Director, Department of Public Safety:

It appears from the request for opinion and the statement of taxes thereto attached that the Department of Public Safety, during the year 1948, purchased certain lands in Palm Beach County, Florida, upon which it constructed a highway patrol station for use by it in the administration and enforcement of the statutes of this State regulating traffic on the state highways.

The Department of Public Safety is under the direction and control of the Governor and his cabinet members (§321.01, F. S.) and, therefore, an agency and component part of the state government (see *State v. Love*, 99 Fla. 333, 126 So. 374, text 377, relative to the State Road Department).

The Department is specifically "authorized to purchase, sell, trade, rent, lease and maintain all necessary equipment, uniforms, motor vehicles, communication systems, *housing facilities, office space, and perform any other acts* necessary for the proper administration and enforcement of" the statutes applicable to it (§321.02, F. S.).

The construction of at least two highway patrol stations was authorized by the last general appropriations act (see Item 17, §2, Ch. 28115, Laws of Florida, Acts 1953). Highway patrol stations, as well as all other property owned by the State for use of the highway patrol, whether held in the name of the State or the Department of Public Safety, is "property, real and personal . . . of this State . . ." within the purview of subsection (1), §192.06, F. S., and entitled to exemption from ad valorem taxation. This answers the above stated question in the negative.

Any attempt to levy and assess ad valorem taxes against state property in the absence of a statute expressly authorizing such a

tax, and no such statute has been found authorizing the taxation of highway patrol stations, is without authority and the taxes so levied void and any tax sale certificate based thereon is likewise void and subject to cancellation as provided by law. Application for such cancellation should be made through the clerk of the Circuit Court to the State Comptroller in the usual manner.

May 29, 1953.—053-114.

**HIGHWAY PATROL—JURISDICTION—TRAFFIC VIOLATIONS ON STATE ROAD DEPARTMENT FERRIES—
§321.05, F. S. APPLICABLE**

QUESTION: Do Florida Highway Patrolmen have any jurisdiction in handling traffic violations which occur on Florida State Road Department ferries while operating over navigable waters?

To: Col. H. N. Kirkman, Director, Department of Public Safety:

Chapter 341, F. S., provides for a state system of highways, bridges and ferries. Section 341.09 provides:

“Road’ and ‘roads’ defined.—The terms ‘road’ and ‘roads’ as used in this chapter shall be construed to mean and include all highways and ways for public travel, including means for crossing streams by ways of bridges or ferries, under the jurisdiction of the several boards of county commissioners, or boards of bond trustees of the several counties or subdivisions thereof, of this state, or upon which such boards may expend any public money or cause work to be done, or any roads that may by this or any other law be placed under the supervision and control of the state road department.”

22 Am. Juris. 553, par. 2, states:

“Definition—The term ‘ferry’ usually implies the continuation, by means of boats, barges, or rafts, of a highway or the connection of highways located on the opposite banks of a stream or other body of water. The term necessarily implies transportation for a short distance, almost invariably between two points only, which is unrelated to other transportation. It has been so defined by statute in some states. From a practical point of view, the word ‘ferry’ connotes transportation from one shore of a body of water to the opposite shore for a charge known as a ‘toll’. Accordingly, a ferry has been defined as a place where persons are taken across a river or other stream in boats or other vessels for hire. A ‘ferry’ has also been defined by many courts as a public highway or thoroughfare across a stream of water or river by boat instead of a bridge, or, as one court said, a ferry is a moving public highway upon water.

Note: “In a strictly technical sense, a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation

of passengers or of travelers with their teams and vehicles and such property as they may carry or have with them. *St. Clair County v. Interstate Sand & Car Transfer Co.* 192 U. S. 454, 48 L. ed. 518, 24 S. Ct. 300."

Section 321.05, F. S., sets out the duty of highway patrol officers. It provides, among other things, that patrol officers shall "patrol the public highways" and "enforce all state laws... regulating and governing traffic, travel and public safety upon the public highways..."

Since Florida Highway Patrolmen are authorized to enforce traffic laws on all public highways and since ferries such as you have described are a part of the state highway system, your question is answered in the affirmative.

May 20, 1954.—054-119.

HIGHWAY PATROLMEN—ARRESTS—SHERIFF'S FEES

QUESTIONS: 1. Where a highway patrolman makes an arrest for a violation of the traffic laws of the State and pursuant to §321.05(4) (a), F. S., obtains from such person a recognizance for his appearance before a proper tribunal of the county to answer the charge, the patrolman making the required affidavit before a committing magistrate, under the circumstances is it necessary that a warrant or *capias* thereafter issue and be served upon the accused?

2. Where a defendant is arrested under the circumstances stated in question one, and is released upon his own recognizance, may a sheriff or constable be paid a fee for re-arresting him for the same offense before or at the time the defendant appears in court pursuant to such recognizance, where there is no attempt to absent himself, (a) if a warrant or *capias* has been issued for the same offense and (b) without a warrant or *capias*?

To: Honorable Bryan Willis, State Auditor, Tallahassee, Florida:

As to Question One

In Opinion 053-71, I held that where a bond is taken by a highway patrolman, pursuant to the provisions of §321.05(4) (a), F. S., requiring the appearance of an alleged traffic violator in the trial court, no *capias* should properly issue upon the filing of the information so as to cause a re-arrest of the accused. This is for the obvious reason that the arrest has already been made by the highway patrolman and another arrest is entirely unwarranted.

As contemplated by the question now under consideration, the highway patrolman instead of requiring bond, obtains a recognizance from the alleged traffic violator. The recognizance requires the appearance of the arrested party at a particular time in a designated court to answer the charge preferred. I can see no difference in principle from that where a bond is taken. In either event the accused is arrested so that jurisdiction has been ob-

tained over him, and he is required to answer the charge at a later date.

Consequently, the question is answered in the negative.

As to Question Two

(a) If a warrant or *capias* issues and is placed in the hands of the sheriff for service, the sheriff necessarily must obey the command of the said warrant or *capias* and arrest the person against whom the same is directed. In such case, he is, of course, upon executing the warrant or *capias*, entitled to the fees allowed by statute.

(b) Where no warrant or *capias* issues, the sheriff has no authority of law to arrest an alleged traffic violator charged with an offense for which an arrest has previously been made by the highway patrolman.

Hence (a) is answered in the affirmative and (b) in the negative.

We do not here discuss the situation where the accused is charged with an offense other than that for which he was arrested by the highway patrolman, nor where failure to appear results in a charge under §321.05(4)(b), F. S.

DRIVER'S LICENSES

June 3, 1953.—053-117.

DEPARTMENT OF PUBLIC SAFETY—RECKLESS DRIVING— CONVICTIONS—REVOCATION OF DRIVER'S LICENSES—§§322.25, 322.26, F. S.

QUESTIONS: 1. Is the forfeiture of bail or collateral upon 3 separate and distinct charges of reckless driving, committed within a period of 12 months as set forth in subsection (6) of §322.26, F. S., 1951, sufficient to revoke a driver's license?

2. If the answer to the above question is in the affirmative, is it necessary that all three such forfeitures occur in the same county of the court seeking to revoke the license?

To: *Honorable Otis Whitehurst, Prosecuting Attorney, Highlands County, Sebring, Florida:*

I am unable to discover any decisions by the Supreme Court construing this particular problem. However, it would seem to me that §322.25, subsection (3), defines the term "conviction" to be synonymous with the term "forfeiture of bail or collateral deposited to secure a defendant's appearance in court."

Subsection (6), §322.26, seems clearly to intend that the forfeiture of bail, not vacated, upon three charges of reckless driving during a 12-month period shall constitute a cause for the revocation of a driver's license. It will be noted that subsections (1), (2), (3), (4), (5) and (7) of §322.26 all provide for the con-

viction of an individual crime constituting the basis for the revocation of a driver's license. On the other hand, subsection (6) thereof makes the forfeiture of bail upon three charges of reckless driving in a 12-month period, while not a crime in and of itself, the equivalent of the other six offenses enumerated in the statute. As the language of subsection (6) is very clear and unambiguous, it is my opinion that a revocation for such cause would be sustained by the Supreme Court. Hence, your first question is answered in the affirmative.

As to your second question, it will be noted that subsection (2) of §322.25 authorizes the court having jurisdiction of the offenses enumerated in §322.26 to revoke or suspend licenses for such cause. This section also requires that the court shall forward to the Department of Public Safety a record of the conviction of any person in such court for a violation of any of the laws pertaining to this chapter. By virtue of subsection (3), §322.25, this includes forfeiture of bail for reckless driving.

Hence, it is seen that a person may forfeit his bail upon separate charges of reckless driving in different counties or even different courts in the same county and the court having jurisdiction where the last bond was forfeited may not have the information of the previous forfeitures. However, the Department of Public Safety, by virtue of subsection (2) of §322.25 should have a record of all such forfeitures. In answer to your second question, I am of the opinion that if the three forfeitures enumerated in subsection (6) of §322.26 occurred in the same court, the statute would authorize the court's entering an order finding the three forfeitures and upon the basis of the same, revoking the license. In this instance, the court's records would reflect the foundation for its order. However, in the case where the three forfeitures do not occur in the same court, I would think that the better practice would be for the Department of Public Safety to revoke the license, in which case its records would show the foundation for the order.

December 16, 1954.—054-267.

MUNICIPAL JUDGE—DRIVER'S LICENSE REVOCATION— FORFEITURE OF BAIL OR COLLATERAL

QUESTION: Should a municipal judge require the surrender of a driver's license in cases involving mandatory revocation if the defendant forfeits bail or collateral?

To: Honorable John W. Douglas, Judge of Municipal Court, Ft. Lauderdale, Florida:

In my opinion, the Court should proceed to require the surrender of the driver's license by such means as may be necessary in such cases and forward said license, together with the record of conviction or forfeiture to the Department of Public Safety in compliance with §322.25, F.S.

AUTO TRANSPORTATION COMPANIES

December 16, 1954.—054-264.

MOTOR VEHICLES—TRANSPORTATION COMPANIES— PUBLIC TOLL ROADS AND BRIDGES—MILEAGE TAXES

QUESTION: Are the mileage taxes imposed by §323.15, F.S., upon vehicles of auto transportation companies and other like and similar vehicles, applicable to mileage traveled by such vehicles over public toll roads and bridges within this State?

To: Honorable C. M. Gay, State Comptroller:

Section 323.15, F.S., provides that "there shall be collected by the Comptroller of the State from every auto transportation company . . . a mileage tax . . . for every mile traveled for compensation by the motor vehicles of such auto transportation company *over the public highways of this State . . .* The mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, state, county or municipality, including excise and license taxes . . ." excepting certain taxes not here material. Under §323.16, F.S., twenty-five per cent of the taxes collected is paid into the State General Revenue Fund, a small portion to the municipalities wherein transportation companies maintain depots, warehouses, etc., and the remainder to the State Board of Administration, for the road distribution fund, for the benefit of the counties to be used as are funds under §16, Art. IX, of the State Constitution. Under §323.25, F.S., "all mileage taxes prescribed by this chapter . . . shall be deemed to be compensatory for the *use of the public highways of this State . . . and as a fair contribution to the cost of constructing and maintaining the public highways of this State* and the administration and enforcement of this chapter . . ." Section 320.16, F.S., relates to licenses and license tags for vehicles engaged in interstate commerce and further provides that the registration fee charged such vehicles is to be treated as "an advance payment on the compensation entitled to be received by the State for the use of *the State's highway system*," that is the mileage taxes, which are "declared to be a reasonable and just compensation to be charged and collected for the *use of the improved highway system* provided by the state and its several counties, districts and municipalities for the use of motor vehicles . . ."

In the statutes above referred to and quoted from we find references to "the public highways of this State," "the State's highway system," and "the improved highway system provided by the State and its several counties, districts and municipalities." "Public highways" are defined in Section 323.01, Florida Statutes, as including "every public street, road or highway in this State." The term "highway" is defined in §317.74, F.S., as "any public road, street, avenue, alley, boulevard, bridge, viaduct or trestle and the approaches thereto within the limits of the State of Florida." License taxes are required of all motor vehicles "operated over the public highways and streets of this State." (see Ch. 320, F.S.). The rule generally approved by the authorities is that a public highway or road is one open to the public for passage (*State v. Coleman*. 155 Fla. 555. 20 So. 2d 911; *Hillsborough County v.*

Highway Engineering and Construction Company, 145 Fla. 83, 199 So. 499, text 503). The terms "public highway," and "public road" have often been held to include toll roads and turnpikes (35 Words and Phrases 127), however, none of these authorities seem to relate to mileage taxes.

Mileage taxes being charged and collected "for the use of the State's highway system," "the use of the improved highway system provided by the State and its several counties, districts and municipalities," and "deemed to be compensation for the use of the public highways of the State... as a fair contribution to the cost of constructing and maintaining" such public highways (see §§320.16 and 323.15, F.S.), have usually been upheld, even where the vehicle so taxed has been engaged in interstate commerce (*Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 70 S. Ct. 806, 94 L. Ed. 1053, 17 A. L. R. 2d 407 and Annotation page 438-9; *Southwestern Greyhound Lines v. Railroad Commission, Tex.*, 99 S. W. 2d 263, 109 A. L. R. 1235, text 1242; *Interstate Busses Corporation v. Blodgett*, Tax Commissioner, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551). Such so-called mileage taxes are treated as compensation charged for the use of its highways. The Legislature has determined that vehicles coming under Chapter 323, Florida Statutes, should pay a mileage tax, because of their frequent use of the highways, not charged and collected from other vehicles using the highways. This mileage charge is clearly compensation to be paid by the owners of such vehicles for their use of the public highways of the State, its counties, districts and municipalities. The fact that the state, its counties, districts or municipalities charge a toll would not seem to defeat the mileage tax where there has been invested in such highway or road any public funds, or where the highway or road will become a part of the public free highway system after it has been paid for through tolls and similar charges. There is no requirement that the mileage taxes be expended upon the identical roads and highways over which the vehicle paying the mileage tax moved.

Where a toll road or turnpike is privately owned and may never become a part of the system of state, county, district or municipally owned system of highways we do not think that such a toll road or turnpike is a public highway within the purview of §323.15, F.S. There are now few, if any, such toll roads or turnpikes within this State.

Chapter 28128, Laws of Florida, Acts of 1953, also known as the Florida Turnpike Act, provides for the construction of the so-called "Sunshine State Parkway" on the lower east coast of Florida, and sets up the machinery for the construction of a turnpike from the Georgia line to the said Sunshine State Parkway whenever expressly authorized by the Legislature. Under this enactment the turnpike authority is authorized to finance a turnpike through the issuance of "turnpike revenue bonds... payable solely from revenues" obtained from tolls, rentals, etc. Although the State Road Department is authorized to advance certain funds to the turnpike authority such funds are to be repaid from turnpike funds and no state funds may be used in the construction of the said turnpike nor may the credit of the State be pledged to such

construction or any part thereof. The Florida State Turnpike Authority, which is the governing board under this enactment, is declared to be a state agency (§5, Ch. 28128), established for the purpose of "performing an essential governmental function..." After the said turnpike has been paid for and all bonds and other indebtedness retired the turnpike authority is required to "transfer such project or projects to the state road department to become a part of the state road system to be maintained thereafter by the state road department," although tolls for the upkeep and maintenance may be continued by the state road department. The turnpike authority is authorized to maintain feeder roads and may take over public roads and maintain them as feeder roads; the use of such feeder roads shall not be subject to tolls separate and apart from the main turnpike. "No toll shall be charged for transit between points on such feeder road." Public roads and highways leading from and to the said turnpike will be maintained by the state and its counties and agencies at public expense, and the traffic over such highways and roads may and probably will be increased by reason of the said turnpike. The turnpike will become a link in the State's system of highway transportation. We, therefore, believe that the said turnpike will become a part of the public highway system of the State and within the purview of §323.15, F.S.

The above observations seem to answer the above stated question.

CHAPTER XXIII

AERONAUTICS

AIRPORT LAW OF 1945

June 1, 1954.—054-131.

MUNICIPAL AIRPORTS—ESTABLISHMENT— EQUIPMENT—COMPETITIVE BIDS

QUESTION: Where a municipality leases or acquires an airport from the United States, and there is located upon said airport tangible personal property belonging to a commercial air line and such property or other like property is needed and necessary for the proper operation of the said airport, may the municipality acquire such property from the air line in exchange for the use of the airport and its facilities for a stated period of time, without complying with the requirements of §125.08, F. S., in so far as it relates to the purchase of tangible personal property?

To: *Honorable Paul E. Sawyer, Legal Advisor, Monroe County, Key West, Florida:*

Under said §125.08, F. S., no contract for the purchase of "any goods, supplies or materials for county purposes or use" may be entered into when the amount to be paid therefor by the county exceeds the amounts mentioned in said statute "unless notice thereof shall be advertised for at least two weeks in some newspaper of general circulation...calling for bids...for the goods, supplies or materials to be purchased by the county..." This statute, except as to the amount of the goods purchased without advertisement, has been a part of the statutes and laws of Florida since 1909.

The 1951 and 1953 changes related primarily to the amounts that may be purchased without advertisement and competitive bidding. Section 125.08, above mentioned, would appear to be applicable unless superseded in part by Ch. 22846, Laws of Florida, Acts of 1945, now appearing as Ch. 332, F. S.

Under said Ch. 332, F. S., any *county, city, village or town* of this State (§332.02(1), F.S.) may acquire property, real or personal, for the purpose of *establishing, constructing and enlarging* airports...and to acquire, establish, construct, *enlarge, improve, maintain, equip, operate and regulate* airports. The county was authorized, under Ch. 218, F.S., to lease the airport in question (§218.07, F.S.). "Property needed by a municipality (including counties) for an airport...or for...airport purposes...may be acquired by purchase, gift, devise, lease or other means if such municipality *is able to agree with the owners of said property on the terms of such acquisition*, and otherwise by condemnation in the manner provided by law..." (§332.02(2), F. S.). The above underlined language seems to contemplate the purchase

or other acquisition of needed property without advertisement and competitive bidding; advertisement and competitive bidding would seem to exclude agreement with the owners on the terms of acquisition. The said statute clearly contemplates that in cases where such agreement as to terms of acquisition cannot be arranged that condemnation may be resorted to; does this provision limit the property that may be acquired under the statutory provision?

Section 12 of the Declaration of Rights, and §29 of Art. XVI, of the State Const., and Ch. 73, F. S., relate to the taking of "private property" for public use by eminent domain. The term "private property" is not necessarily limited to real property. Eminent domain may generally be used for the taking of all or every species of property, including personal as well as real property, but not including money in this country (29 C. J. S. 852-3, §65; 2 Lewis' Eminent Domain, 3rd Ed. 744, §413 (263); 18 Am. Jur. 712, §82; In Re Opinion of Justices, 261 Mass. 523, 159 N. E. 55, text 67). We are led to the conclusion that §332.01, F. S., provides a method, separate and apart from §125.08, F. S., for acquiring real and personal property needed for airport purposes, including equipping and operating airports.

This opinion is not to be construed as applying to every situation where the county may wish to acquire tangible personal property for use in its airport. Rather, it is limited to those cases where the county is establishing or enlarging its airport. Thereafter where various items of personal property are from time to time to be acquired and the amount exceeds the limit fixed by §125.08, F. S., competitive bids should be requested and the award made to the lowest responsible bidder, unless all bids are too high and for that reason rejected. An illustration is where counters or other fixtures may be needed, and the amount thereof, in the case of Monroe County, exceeds \$500.00.

The above question is answered in the affirmative, so long as Ch. 332, F. S., is complied with and the transaction is kept free from fraud or other matters which might be held to avoid the contract.

CHAPTER XXIV

HIGHWAYS, BRIDGES AND FERRIES

TURNPIKE AUTHORITY

May 7, 1954.—054-112.

FLORIDA TURNPIKE ACT—RELOCATION OF UTILITIES— COST OF REMOVAL—CONCESSIONS—SALE OF FOODS ALONG TURNPIKE

QUESTIONS: 1. Under what circumstances must the Florida State Turnpike Authority bear the cost of removal or relocation of public or private utilities facilities, such as trucks, pipes, mains, conduits, cables, wires, towers, poles, etc.?

2. May the Turnpike Authority grant concessions for the operating of restaurants on or along the Turnpike?

To: Honorable Marvin Adams, Chairman, Florida State Turnpike Authority, Miami, Florida:

Section 340.07(5), which is §4(2) of Ch. 28128, Laws of 1953, provides for the installation, construction, maintenance, repair, renewal, relocation and removal of the facilities named in your question.

While the language of the subsection is somewhat complicated, it is my opinion that it requires the Turnpike Authority to bear the cost in practically all cases, except that in a few instances there may be public or private facilities installed on an existing public roadway or street, which roadway or street is to be incorporated into the layout of the Turnpike, and such facilities are subject to prior agreements or statute to be removed or adjusted where necessary to accommodate new highway or Turnpike requirements. If you will give me the exact circumstances in any particular case, I shall be glad to give you a prompt and definite answer.

With the second question you call attention to the last sentence of §340.04(2) which reads:

“...The Authority is specifically prohibited from granting concessions or selling any services or products along the project covered by this act or subsequent projects except the sale of motor fuel with attendant towing and maintenance facilities and the sale of food prepared and ready for consumption with attendant non alcoholic beverages.”

The prohibition is against the granting of concessions for the sale of food except food which is prepared and ready for consumption. While food which is “prepared and ready for consumption” would include cooked foods such as are sold in a cafe-

teria type of restaurant, it is my opinion that the Legislature did not intend to project a serious constitutional question by discriminating against other types of restaurants in favor of the cafeteria type. As to foods, it is my opinion that the Legislature intended to permit the sale only of packaged foods.

June 23, 1954.—054-152.

TURNPIKE AUTHORITY—EXPENSES—AUTHORIZED ADVANCES BY S.R.D.

QUESTION: Does the State Road Department have authority to pay to the section engineers their compensation as provided in their respective contracts with the Florida State Turnpike Authority?

To: *Honorable Cecil Webb, Chairman, State Road Department:*

Section 27(1), of Ch. 28128, Laws of 1953, referring to preliminary and other expenses of the Turnpike Authority, provides:

"The state road department, upon the request of the authority, is hereby authorized to expend out of any funds available for the purpose such moneys, and to use such of its engineering and other forces, as may be necessary and desirable in the judgment of the department, to enable and accelerate the beginning of the construction of the project authorized by section 3 hereof."

Subparagraph 3 of the same section provides that these expenses shall be treated as a part of the cost of the project and shall be reimbursed to the State Road Department out of the proceeds of the bonds authorized for the project.

The compensation of the section engineers is clearly within the authorized advances, and it is my opinion that your department may lawfully make the advances described in your question upon request of the Turnpike Authority and your department's determination that the advances are necessary and desirable to enable and accelerate the beginning of the construction of the Turnpike project.

STATE ROADS

August 11, 1954.—054-201.

STATE ROAD DEPARTMENT—TOLL CHARGES— IMMUNITY FROM FEDERAL TAXATION

QUESTION: Is the State Road Department, as lessee under an agreement for lease and purchase, entered into with Ocean Highway and Port Authority, providing for the operation and maintenance of a toll road, together with connecting bridges and ferries, approaches and rights-of-way thereto, extending from the intersection of State Road A.1.A. and the Gerbing Road in Amelia City, and a point of intersection with Heckscher Drive at Fort George, Duval County, Florida, amenable to the provisions of federal statutes designated as Title 26 §§3469 and 3475 U.S.C.A. imposing

a tax upon the amount paid for the transportation of persons and property respectively, to a person engaged in the business of transportation for hire from one point in the United States to another point therein?

To: State Road Department, Tallahassee, Florida:

The answer to the question presented for opinion is in the negative.

Basis for Conclusion

Construction and maintenance of public roads and bridges are governmental functions. *Dodge County Commissioners vs. Chandler*, 96 U.S. 205; *Atkins vs. Kansas*, 191 U.S. 207.

The State may perform this function in its own name or through its governmental agencies. *Howell vs. Port of New York Authority*, 34 Fed. Supp. 797; *Metcalf vs. Mitchell*, 269 U.S. 514 (text 522) *U.S. vs. King County, Washington*, 261 Fed. 688.

It is well settled that the construction and maintenance of public roads and bridges are governmental functions. *Kansas City Bridge Co. vs. Alabama State Bridge Cpn.*, 59 Fed. 2d 48. (certiorari denied 77 L. Ed. 557). There can be no question that the operation of a public ferry as a link in the state highway system is a proper function of the state and that the proceeds of such operation by the state itself would not be subject to federal tax. *Helvering vs. Claibourne Annapolis Ferry Co.*, 93 Fed. 2d 875. It is well settled that, independently of statutory exemption, the property of the states and the instrumentalities of their governmental powers and duties are exempt from federal taxation. *Jamestown and Newport Ferry Co. vs. Commissioner of Internal Revenue*, 41 Fed. 2d 920.

The Applicable Statute

The statute under which the tax in question is sought to be imposed (Ch. 30 Internal Revenue Code, sub-chapters C and E) imposes a tax upon the amount paid for transportation of persons and property within the United States. "Such tax shall apply only to amounts paid to a person engaged in the business of transporting persons or property for hire". The operation of the subject toll road by the state through its governmental agency is not an operation within the purview of the statute, it is not an operation incident to the *business of transportation of persons or property for hire*. The amounts exacted by the state are tolls charged for the privilege of using a special highway for the purpose of travel.

"Toll is a tribute or customs paid for passage, and not for carriage—always something taken for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation or that they are anything more than an excise demanded and paid for the privilege of using the way." *N.Y. L E & Western Railroad Co. vs. Pennsylvania*, 158 U.S. 431 (text 435).

The subject highway is a continuous way consisting of roadbed, bridges, and ferries over open waters, between fixed termini; it is a state highway and a component part of the state system of highways. Such an operation is clearly outside the applicable statute and regulations. *Ellis & Sons vs. U. S.* 187 Fed. 2d 698. *Earle, Collector of Revenue vs. Babler*, 180 Fed. 2d 1016. *Smith vs. U. S.*, 110 Fed. Supp. 892. Had the Congress intended the statute to have the reach claimed for it by the District Collector of Revenue the act would not have used the qualifying words limiting its application "to persons engaged in the business of transportation of (persons) or (property) for hire." *Masonite Corporation vs. Ply*, 194 Fed. 2d 257. *Ohio River Sand Co. vs. United States*, 60 Fed. Supp. 563.

If it may be said that the State through its component governmental agency is engaged in "business" in any sense, it is in the business of construction, operation and maintenance of public highways, which is essentially a governmental function, and not "in the business of transporting property (persons) for hire."

Section 341.09, F. S., defines a state road as follows:

"'Road' and 'roads' defined. — The terms 'road' and 'roads' as used in this chapter shall be construed to mean and include all highways and ways for public travel, including means for crossing streams by ways of bridges or ferries, under the jurisdiction of the several boards of county commissioners, or boards of bond trustees of the several counties or subdivisions thereof, of this state, or upon which such boards may expend any public money or cause work to be done, or any roads that may by this or any other law be placed under the supervision and control of the state road department."

The toll charge for ferry service made by the State Road Department is in the nature of a fee for an additional governmental service which is not altogether paid for from the general gasoline tax revenues accruing to the State Road Department. Parenthetically it may be said the State Road Department has never derived a profit from the operation of the ferry and has had to supplement toll revenues with gasoline tax revenues to defray the cost of the ferry operation. However, such toll charges are similar to the gasoline taxes paid by motor vehicle operators for the use of the highways and it would be just as reasonable for the Federal Government to contend that it could levy a tax upon the state for furnishing highways for public travel and collecting the gasoline tax from the motoring public for such use.

According to the quoted statute (Sec. 341.09), a ferry is an integral part or link in a state road which is a governmental facility and is not generally considered to be a private enterprise or public utility subject to tax. If it is conceded that the Federal Government can tax the state in this instance, we have the reverse of *McCullough vs. Maryland*, since the tax would be levied directly upon the State in the operation of a governmental facility, a transportation facility which is an integral part of the state road. We are not aware that the Federal Government exercises the power

to tax State Governmental instrumentalities and services any more than States can tax Federal instrumentalities.

The conclusion is inescapable that from the viewpoint of either of the hypotheses presented the State is not subject to the imposition of the tax. In the operation of a toll road, and all of its incidental facilities, roadways, bridges, ferries or otherwise, the state is engaged in a strictly governmental function, in its sovereign capacity, and accordingly immune by virtue of implied immunity from federal taxation, by reason of its sovereignty; and aside from this doctrine the state does not in its operation of the subject toll highway fall within the scope of the classification of the statute, or the regulations prescribed for its administration, as a person engaged in the business of transportation of persons or property for hire. I reach the conclusion that the amounts of money received as toll charges for the use of the highway are not legally taxable, nor is the state chargeable with the collection of the tax, or its remittance to the collector of internal revenue.

August 31, 1954.—054-212.

STATE ROAD DEPARTMENT—PLANS AND
SPECIFICATIONS—EMPLOYMENT OF
PRIVATE ENGINEERING FIRMS
ON CONTRACT BASIS

QUESTION: Where the State Road Department has been unsuccessful in employing sufficient numbers of engineers and engineering personnel to prepare the plans and specifications to prosecute its road construction program, do they have authority to secure the temporary service of private engineering firms on a contract basis to prepare the necessary plans and specifications under the direction of the Department?

To: *Honorable Cecil M. Webb, Chairman, State Road Department, Tallahassee, Florida:*

You state the plans and specifications needed are so numerous and extensive for a road and bridge program of such magnitude that it is not possible for the engineering personnel regularly employed by the Department to draft all such plans and specifications and to perform the other engineering services incident thereto. You further state that the Department has endeavored to employ additional engineers as regularly salaried personnel and has even advertised for engineers in the press but all such efforts have been unsuccessful. The Board has found that a real emergency situation exists and the only solution to this problem is to secure the temporary service of a sufficient number of engineering firms on a contract basis.

It is my opinion that the statutory powers of the State Road Department are broad enough to authorize it to contract with private engineering firms for the preparation of plans and specifications for state road and bridge projects.

The State Road Department, as a state agency or board consisting of five members (Sec. 341.01, F. S.) is required by §341.14, F. S. to prepare plans and specifications for all state road bridge

construction work. This would appear to authorize the Road Board to use either its own engineers or contract with private engineering firms for the preparation of such plans.

Section 341.10, F. S., requires employment of a state highway engineer with permissive authority to employ such assistant engineers and to purchase such instruments, supplies and materials as shall be necessary to carry out the provisions of Ch. 341. None of this language would appear to preclude the preparation and purchase of necessary plans and specifications from private engineering firms if the same could not otherwise be secured when needed.

Ordinarily such plans and specifications are prepared by the State Road Department's regularly employed salaried engineers. However, there may be instances where this is impractical. In such circumstances, the Department should have the latitude to contract for the preparation of plans with private engineering firms. In this instance you advise that the normal operations of the Department and the orderly prosecution of the budgeted work of the Department can only go forward by purchasing engineering plans from private engineering firms. It would be a very strained construction of the statutes to hold such authority does not exist, especially where there is no express or implied restrictions to that effect but on the contrary wide latitude is conferred upon the Road Board in prosecuting its work program.

It is suggested that such plans be drawn in accordance with the directions of the State Highway Engineer and be made subject to his approval before being accepted or paid by the Department so that the standards of the Department will be complied with.

It would seem to me that plans and specifications which are prepared on a contract basis by private engineering firms under the direction of the Department and its engineers would necessarily be limited to those projects on which construction contracts are to be awarded pursuant to the current budget. While there is no legal requirement that such engineering contracts be let on a competitive basis, it is recommended that great care be exercised in their negotiation in order to secure services commensurate with the compensation paid and to avoid unnecessary expense or charges of favoritism or partiality in their award.

CHAPTER XXVI

CONSERVATION, ARCHEOLOGY AND GEOLOGY

GAME AND FRESH WATER FISH

September 27, 1954.—054-228.

COUNTY JUDGES—LICENSES—CH. 372, F.S.

QUESTION: Is it the duty of county judges to issue all licenses required under the provision of Ch. 372, F.S.?

To: *Honorable E. B. Jones, Director, Game and Fresh Water Commission:*

Section 372.57(16), F.S., specifically provides that certain types of licenses for fishing, hunting and trapping fur-bearing animals for the State of Florida may be issued by any county judge in the state, and that "all other licenses must be issued by the county judge wherein the license is to be effective or used." The intent of the legislature that it is the duty of county judges to issue licenses under Ch. 372, F.S., is shown in the wording of §372.60, F.S., which reads as follows:

"The game and fresh water fish commission shall furnish to each county judge a form for issuing of duplicate license. Application for such duplicate license shall be made under oath, stating that the licensee has lost or destroyed his original license. Such application shall be made to the county judge from which original license was purchased. . . ." (Emphasis supplied.)

The language of this section states that application for duplicate license "shall be made to the county judge from which original license was purchased." This wording clearly indicates that the application for original license, as well as for duplicate, was made to county judge from whom purchase was made.

Sections 372.62, 372.63, 372.64, 372.65 and 372.66, F.S., respectively, provide that application for license for guide, boats rented for hunting and fishing, commercial fishing boats, fresh water fish dealers and fur and hide dealers shall be made to the Game and Fresh Water Fish Commission. In my mind, it is intended by the legislature that the office before which application is made shall also issue the license. This interpretation is supported by the fact that §372.62, *supra*, which section is the first requiring that application for license be made to the Game and Fresh Water Fish Commission, provides that "No person shall engage in the business of guiding hunters or hunting parties until he has secured a license to do so from the game and fresh water fish commission." It is logical to conclude that the provision for guide licenses be secured from the Game and Fresh Water Fish Commission is intended to apply to sections immediately following.

The requirements by statute that licenses under §§372.62 to 372.66, F.S., be secured from the Game and Fresh Water Fish Commission is not in conflict with Art. V, §17, Florida Const., which provides that county judges "shall issue all licenses required by law to be issued in the county." It is my view that this constitutional provision does not apply to those licenses whose issuance is *specifically* provided for as in the above sections, but, rather, applies *generally* to licenses required by law.

Therefore, based upon the above observations and authorities, it is my opinion that it is the duty of county judges to issue all licenses required under the provisions of Ch. 372, F.S., with the exception of those licenses provided for in §§372.62 to 372.66 of said chapter.

October 22, 1953.—053-286.

GAME AND FRESH WATER FISH COMMISSION—
AUTHORITY—AGREEMENTS WITH U. S.
FOREST SERVICE—FISH AND GAME.

QUESTIONS: 1. Does the Game and Fresh Water Fish Commission have sufficient authority under Art. IV, §30, Const. of Florida, to enter into cooperative agreements with the United States Forest Service for the development of game, bird, fish, reptile or fur-bearing animal management projects on United States forest lands in Florida?

2. If so, does the Game and Fresh Water Fish Commission have to obtain the consent of the Board of County Commissioners of the county in which these forest lands lie?

To: Honorable C. W. Pace, Director, Game and Fresh Water Fish Commission:

Article IV, §30, Const. of Florida, creates the Game and Fresh Water Fish Commission and invests in said commission jurisdiction over the birds, game, fur-bearing animals and fresh water fish of the State of Florida. The Commission is further vested with the authority to acquire, establish, control and manage hatcheries, sanctuaries, refuges and reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida.

Although certain lands within the territorial limits of the State of Florida have been ceded to the United States, and the State has thereby divested itself and its agencies, of any title, authority or jurisdiction over said lands, it is recognized that for the purposes of fishing and hunting the State and the United States still have mutual interests therein and their cooperation is essential for adequate regulation. Special hunts in the various national forests are allowed by the United States Forest Service subject to management by the Game and Fresh Water Fish Commission. Such special hunts were licensed when the Legislature of Florida enacted §372.573, F. S. which authorizes the Game and Fresh Water Fish Commission to issue permits to persons to hunt on lands managed by the said commission. The fee charged

for said permits shall not exceed \$5.00 and shall be in addition to the regular hunting license fee required by law.

Prior to the creation of the Game and Fresh Water Fish Commission by Art. IV, §30, Const. of Florida, the Legislature enacted §372.74, F. S., and Ch. 20877, Acts of 1941 (population act) granting to the Commission of Fish and Game (then a statutory board) the authority to enter into cooperative agreements with the United States Forest Service for the development and management of game, birds, fish, reptiles and fur-bearing animals on certain national forests of the State of Florida, subject to the approval of the Board of County Commissioners of the county in which the forest lands were located.

In view of the broad constitutional powers granted the Game and Fresh Water Fish Commission, it is my opinion that said commission has sufficient authority to enter into such agreements with the United States Forest Service for the management and development of fish and game on national forest lands located in the State of Florida, especially when such fish and game may be taken and used by the people of Florida, or persons permitted by law to fish and hunt in this state.

As a matter of policy the Game and Fresh Water Fish Commission may well consider the advisability of following a procedure similar to that set up by the Legislature in §372.74, F. S., for the statutory Commission of Fish and Game, and co-operate and consult with the various Boards of County Commissioners relative to such agreements, etc.

October 11, 1954.—054-237.

GAME AND FRESH WATER FISH COMMISSION—
CONSERVATION AGENTS— AUTOMOBILES—
SEARCH AND SEIZURES—AUTHORITY

QUESTIONS: 1. Assuming that a Game and Fresh Water Fish Commission conservation agent has reasonable grounds to believe that a rule, regulation or order of the Game and Fresh Water Fish Commission has been violated, what legal right does said agent have to search for and seize contraband in an automobile or other vehicle on the highways of the state without a search warrant?

2. Assuming that said agent has a legal right to search for and seize contraband in an automobile or other vehicle where a rule, regulation or order of the Game and Fresh Water Fish Commission has been violated, what force may said agent use in bringing said automobile to a halt for the purpose of search and seizure?

To: *Honorable Tom Treadwell, County Prosecuting Attorney, Collier County, Everglades, Florida:*

AS TO QUESTION ONE:

A portion of the police powers of the Game and Fresh Water Fish Commission and its agents are defined in §372.07, F.S. as follows:

"The game and fresh water fish commission and each and every of its duly authorized conservation agents, have power and authority, throughout the state, to enforce all laws relating to game, non-game birds, fresh water fish and fur-bearing animals, and in connection with said laws, in the enforcement thereof and in the performance of their duties thereunder, to . . . *arrest upon probable cause without warrant any person found in the act of violating any of the provisions of said laws* or, in pursuit immediately following such violations, examine any person, boat, conveyance, vehicle, game-bag, game-coat or any other receptacle for game, nongame birds, fresh water fish or fur-bearing animals . . ." (Emphasis supplied.)

As to authorization and limitation of search and seizure of the said commission and its officers, it is provided in §372.76, F.S., as follows:

"The game and fresh water fish commission and its conservation officers shall have authority when they have *reasonable and probable cause to believe that the provisions of this chapter have been violated*, to board any vessel, boat or vehicle or to enter any fish-house, or ware-house or other building, exclusive of residence, in which game, hides, fur-bearing animals, fish or fish nets are kept and to search for and seize any such game, hides, fur-bearing animals, fish or fish nets had or held therein in violation of law. *Provided, however, that no search without warrant shall be made under any of the provisions of this chapter, unless the officer making such search has such information from a reliable source as would lead a prudent and cautious man to believe that some provision of this chapter is being violated.*" (Emphasis supplied.)

Section 372.73, F.S., provides that "All game and fresh water fish seized under the authority of this chapter shall, upon conviction of the offender or sooner if the court so orders, be forfeited . . ."

Things outlawed and subject to forfeiture and destruction upon seizure have been defined as articles of "contraband." 9 Words and Phrases, 1954 Cumulative Annual Pocket Part 58. All game and fresh water fish taken in violation of the laws of Florida or the rules and regulations of its agencies are outlawed and subject to forfeiture upon seizure. Consequently, these things come within the definition of articles of "contraband."

In the case of *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790, found in volume 25 F.S.A. 208, as a part of the statutory law of Florida, the rule of a search and seizure upon probable cause is discussed as follows:

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or vehicle contains that which by law is subject to

seizure and destruction, the search and seizure are valid."

In the Carroll case, *supra*, quoting from the case of *Stacey v. Emery*, 97 U.S. 642, 645 (24 L. Ed. 1035), probable cause is defined as follows:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

Section 22, Declaration of Rights, Florida Consti., provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and or things to be seized."

"This provision makes the question of 'probable cause' a judicial question, to be determined by a judge or magistrate before he issues the search warrant," whereas §§372.07 and 372.76, F.S. have delegated this judicial power to the seizing officer. *Thurman v. State*, 156 So. 484. This judicial power has been delegated because of the "necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality of jurisdiction in which the warrant must be sought." *Carroll v. United States*, *supra*.

The effect of the above is that it would be unlawful to search a dwelling house, store or other structure without a search warrant, while it would be lawful to search upon "probable cause" a ship, motor boat, wagon or automobile without a warrant.

Based upon the above authorities, a Game and Fresh Water Fish Commission conservation agent may search an automobile or other vehicle on the highways of Florida and seize contraband goods without a search warrant if the search and seizure is made upon "probable cause" based upon a belief, reasonably arising out of circumstances known to the seizing officer, that such automobile or other vehicle contains that which is subject to seizure and destruction, or such agent may make such search and seizure if he has information from a reliable source as would lead a prudent and cautious man to believe that a rule, regulation or order of the Commission is being violated. Therefore, as qualified, this seems to answer question one.

However, your attention is directed to the fact that a conservation agent has thrust upon him by the Legislature the responsibility of determining the *judicial question of probable cause* where he undertakes to search for and seize contraband goods or items in an automobile or other vehicle without a search warrant, and, consequently, he should conduct himself *judicially* in the exercise of this delegated power.

AS TO QUESTION TWO:

Section 372.83, F.S., provides that any person violating any rule, regulation or order of the Game and Fresh Water Fish Commission shall be guilty of a misdemeanor.

Discussing the amount of force to be used in making arrests for misdemeanors, in 6 C.J.S. 614, it is said:

"In arresting a person for an offense less than a felony, generally an officer or private person has no right to use firearms, unduly to endanger human life, to shed blood, or to shoot or kill the offender in order to prevent his escape or overcome his resistance to arrest, even though the offender cannot otherwise be taken, unless such measures are necessary in self-defense. In this respect the courts generally observe distinction between arrests for misdemeanors and arrests for felonies, and the basis for this distinction is said to be the fact that the security of person and property is ordinarily not unduly endangered by a misdemeanorant."

In 4 Am. Jur., 53, it is said:

"An officer having the right to arrest a misdemeanorant may use such force as is necessary to effect his purpose, but he must not use excessive force."

In *Dixon et al. v. State* (Fla.), 132 So. 684, a case where defendant arresting officers were charged with culpable negligence for shooting into an automobile they were pursuing and inflicting a wound upon one of the occupants, it is said:

"Conceding, for the purposes of this discussion only, that defendants had authority to make the arrests of the occupants of the pursued car without a warrant, such authority included the lawful power to use such force as they then had reasonable cause to believe, and did believe, was necessary to make the arrest; but it included the right to use no more, and the use of any greater force was beyond the scope of their authority, unauthorized, and without justification. Here too, the measure of necessary force is generally considered to be that which an ordinary prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. See 5 C.J. 424, §59; 1 Bishop's New Criminal Procedure, §159; *State v. Boggs*, 87 W. Va. 738, 106 S.E. 47, 18 A.L.R. 1360, and notes 1368.

"[9] The amount of force which an officer may lawfully use in making an arrest is so much as is necessary to accomplish his object... If the amount used is more than the occasion requires, he is criminally liable for the excess. *Patterson v. State*, 91 Ala. 58, 8 So. 756."

These authorities seem to answer question two.

June 24, 1953.—053-132.

GAME AND FRESH WATER FISH COMMISSION—
EXPENDITURE AND BUDGETARY RESTRICTIONS
—CH. 28115, ACTS 1953—APPLICABILITY.

QUESTION: Do Sections 7, 9, (1), (2), and (4), 10 (1), (2), and (3), 11, 15 and 20 of the General Appropriations Act, being Chapter 28115, Acts of 1953, apply to the Game and Fresh Water Fish Commission?

To: *Honorable C. W. Pace, Director, Game and Fresh Water Fish Commission:*

Sections 7, 9 (1), (2), (3), and (4), 10 (1), (2), and (3), 11, 15 and 20 of Ch. 28115, Acts of 1953, place certain restrictions and prohibitions on spending and budgetary matters of state agencies.

Article IV, §30, Const. of Florida, establishes the Game and Fresh Water Fish Commission as a constitutional agency and defines its duties, powers and responsibilities. Certain subsections of said constitutional provisions that are pertinent to the question provide as follows:

"4. . . The Commission shall also have the power to acquire by purchase, gift, all property necessary, useful, or convenient, for the use of the Commission in the exercise of its powers hereunder." (See Opinion #051-307 relating to the purchase of automobiles by the Commission. Copy attached hereto.)

"5. The Commission shall appoint, fix the salary of, and at pleasure remove a suitable person, as Director, and such Director shall have such powers and duties as may be prescribed by the Commission in pursuance of its duties under this Section. *Such Director shall, subject to the approval of the Commission, appoint, fix the salaries of, and at pleasure remove, assistants, and other employees who shall have such powers and duties as may be assigned to them by the Commission or the Director. No Commissioner shall be eligible for any such appointment or employment.*" This section of the Constitution apparently grants to the Commission and the Director thereof the sole authority to fix the salaries of the employees of the Commission.

"6. The funds resulting from the operation of the Commission and from the administration of the laws and regulations pertaining to birds, game, fur bearing animals, fresh water fish, reptiles, and amphibians, together with any other funds specifically provided for such purposes shall constitute the State Game Fund and shall be used by the Commission as it shall deem fit in carrying out the provisions hereof and for no other purposes. *The Commission may not obligate itself beyond the current resources of the State Game Fund unless specifically so authorized by the Legislature.*" (Emphasis supplied.)

It is my opinion that the language of subsections 4, 5 and 6 of Art. IV, §30, Constitution of Florida, gives the Commission power to acquire by purchase, "all property necessary, useful or convenient, for the Commission's use in exercising its powers," and gives it the right to use the State Game Fund as the Commission "shall deem fit in carrying out the provisions hereof" is so broad as to give the Commission the authority to make such purchases and fix salaries, etc., as are necessary to carry out its duties and responsibilities without regard to the statutory limitations placed on other agencies. Since application of the statutes under consideration would result in placing a limitation on the constitutional powers of the Commission, and since it is a well known principle of law that the Legislature cannot by statute limit, amend or change a constitutional provision, it is my opinion that your question should be answered in the negative.

Although I do not feel that the General Appropriations Act imposes any restrictions on the Game and Fresh Water Fish Commission, I believe it would be helpful, protective and highly desirable if the Commission would, as a matter of policy, elect to come under the provisions as do other state agencies.

June 24, 1953.—053-133.

GAME AND FRESH WATER FISH COMMISSION—SALES AND EMPLOYMENT CONTRACTS—VALIDITY

QUESTIONS: 1. Is the contract of employment between the Game and Fresh Water Fish Commission and Mr. Jack Grant, dealing with the publication of the Florida Wildlife Magazine, valid and binding on the newly appointed Commission?

2. Is the contract between the Game and Fresh Water Fish Commission and Mr. Tony Gonzalo, relating to the sale of commission owned motor vehicles, valid and binding on the newly appointed Commission?

To: *Honorable C. W. Pace, Director, Game and Fresh Water Fish Commission:*

From 73 C.J.S. 399, §72, we quote the following:

"As a general rule an administrative body has authority to enter into contracts in the exercise of its business or proprietary powers, but the members of such an agency cannot in the exercise of governmental powers bind their successors by contracts extending beyond their term of office.

"It has been held that in the exercise of its governmental powers an administrative agency, in the absence of specific authority, as a general proposition cannot make a contract extending beyond its term of office, although such a contract, when authorized by the legislature, is valid and binding on its successors. However, in the exercise of its business or proprietary powers, such a board or commission may contract as does a private corporation or as do individuals, unless it is otherwise restrained.

As to such matters they have been held empowered to contract beyond the term of the members. . . ." (emphasis supplied)

The test of validity is set forth in Board of Com'rs of Edwards County v. Simmons, 151 P. 2d 960:

"The test generally applied is whether the contract is an attempt to bind successors in matters incident to such successors' administration and responsibilities, or whether it is a commitment of a sort reasonably necessary for protection of public property, interests, or affairs being administered, and in the former case the contract is generally held to be invalid and in the latter case valid."

Relative to Question One, I wish to specifically call your attention to Subsection 6 of Art. IV, S 30, Const. of Florida:

"The funds resulting from the operation of the Commission and from the administration of the laws and regulations pertaining to birds, game, fur-bearing animals, fresh water fish, reptiles, and amphibians, together with any other funds specifically provided for such purposes shall constitute the State Game Fund and shall be used by the Commission as it shall deem fit in carrying out the provisions hereof and for no other purposes. *The Commission may not obligate itself beyond the current resources of the State Game Fund unless specifically so authorized by the Legislature.*" (Emphasis supplied)

We find no legislative act which permits the Game and Fresh Water Fish Commission to obligate itself beyond the current resources of the State Game Fund. While the said fund is a continuing appropriation it consists mostly of licenses and fees set by the Legislature, which are collected on a yearly basis and all are subject to repeal at any session of the Legislature.

Subsection 5, Art. IV, S 30, Constitution of Florida provides:

"The Commission shall appoint, fix the salary of, and at pleasure remove a suitable person, as Director, and such Director shall have such powers and duties as may be prescribed by the Commission in pursuance of its duties under this Section. Such Director shall, subject to the approval of the Commission, appoint, fix the salaries of, and at pleasure remove, assistants, and other employees who shall have such powers and duties as may be assigned to them by the Commission or the Director. No Commissioner shall be eligible for any such appointment or employment."

To hold the 4 year contracts valid would be to nullify the foregoing provisions of the Constitution that permit the Director with the approval of the Commission to remove employees and assistants at pleasure, and would obligate the State Game Fund beyond its current resources.

Aside from the legal aspects, we feel that for the orderly operation of the new Commission, it should be able to terminate employment contracts.

February 3, 1954.—054-24.

HUNTING AND FISHING LICENSES— RESIDENCE REQUIREMENTS

QUESTION: What constitutes a "resident" as referred to in §372.57, F.S., and its application in the issuance of hunting and fishing licenses?

To: Honorable C. W. Pace, Director, Game and Fresh Water Fish Commission:

Section 372.57, F.S., provides exemptions from license taxes to "*residents more than sixty-five years of age,*" and "*residents of the state fishing with not more than three poles . . . in the county of his residence,*" "hunting licenses for residents" for the state at large, for a county, etc., and exemptions to "*a resident to take game in the county of his residence*" and licenses for "*residents to take fur-bearing animals.*" Under Section 372.001, Florida Statutes, a "resident" or "resident of Florida", is defined as "including citizens of the United States who have continuously resided in this state, next preceding the making of their application for hunting, fishing or other license for the following periods of time . . . for six months *when applied to the fresh water fish and game laws . . .*" The above definition appears to have been derived primarily from §1, Ch. 13644, Laws of Florida, Acts of 1929, where the word "resident", as applied to fresh water fish and game statutes, is defined as a citizen of the United States who has "*lived in Florida for at least six months immediately preceding the making of application for a license*" to take fresh water fish or game. Resident was defined in §1, Ch. 11838, Laws of Florida, Acts of 1927, in substantially the same words as in the 1929 act. Under §§1292 and 1293, R.G.S., 1920, and §§19 and 20, Ch. 6969, Laws of Florida, Acts of 1915, and §§25 and 26, Ch. 6535, Laws of Florida, Acts of 1913, "any person who has been a *bona fide resident of the state* for one year then last past" was entitled to procure a state or a county hunting or fishing license.

"The residence of a party consists of facts and intention. *Warren v. Warren*, 73 Fla. 764, 75 So. 35, L.R.A. 1917 E. 490. Residence indicates place of abode, whether permanent or temporary, *Minick v. Minick*, 111 Fla. 469, 149 So. 483. A resident is one who lives at a place with no present intention of removing therefrom. *Tracey v. Tracey*, 62 N.J.E. 807, 48 A. 533." (*Kiplinger v. Kiplinger*, 147 Fla. 243, 2 So. 2d 870, text 873; *Fowler v. Fowler*, 156 Fla. 316, 22 So. 2d 817, text 818). A "resident" has been said to be a person living at a fixed place of abode with a bona fide intention of remaining there, if not permanently, at least indefinitely (*Smith v. Smith*, Miss., 12 So. 2d 428, text 429). A person to be a permanent resident of this state does not have to be a citizen, in fact an alien may be a permanent resident of the state (*Smith v. Voight*, 158 Fla. 366, 28 So. 426).

When §372.57, F.S., is read in conjunction with §372.001, F.S., previous statutes and laws regulating the taking of fresh water fish and game in this state, and the above quoted authorities, we feel that the term "residence" as used in said §372.57, contemplates

a person who has located in this state with a bona fide intention of living at a fixed place of abode, if not permanently, at least indefinitely, and who has continuously resided in this state for a period of six months next preceding the application for a fresh water fish or hunting license under said §372.57. We do not see how a person may be a resident, within the purview of §§372.001 and 372.57, F.S., of more than one county at the same time.

SALT WATER FISHERIES AND CONSERVATION

January 6, 1954.—054-3.

CONSERVATION BOARD—SALT WATER FISHING— VIOLATIONS—ARRESTS—CONFISCATION AND FORFEITURE—COURT FEES

QUESTIONS: 1. When a confiscation arises in connection with an arrest and conviction for violation of the State Conservation Laws (Ch. 28145, Laws of Florida, Acts of 1953) in a court where the judge or clerk is paid a flat fee for his services in a criminal case, is any fee, in addition to the flat fee, payable to the judge or clerk for his services in connection with such confiscation?

2. If the answer to the above question is in the affirmative, what fee is payable and by whom is it payable?

3. In connection with confiscation proceedings under Ch. 28145, supra, when such confiscation is not in connection with an arrest and conviction of said conservation laws, and the owner of the confiscated property is unknown, what fee is payable to the county judge and by whom is it payable?

To: Honorable Bryan Willis, State Auditor:

Chapter 28145, Laws of Florida, Acts of 1953, relates to the conservation of natural resources in the salt waters of the State of Florida, and subparagraph 7(b), subsection 2, §2 of said chapter provides as follows:

"In all cases of arrest and conviction for the illegal taking, or attempted taking, sale, possession or transportation of salt water fish or other salt water products; such salt water products, seines, nets, boats, motors, or other fishing devices or equipment, and such vehicles or other means of transportation used in connection with such illegal taking or attempted taking are hereby declared to be nuisances and shall be seized and carried before the court having jurisdiction of such offense, and said court shall order such nuisances forfeited to the state board of conservation immediately after trial and conviction of the person or persons in whose possession they were found, * * * When any illegal or illegally used seine, net, trap, or other fishing device or equipment or illegally taken, possessed or transported salt water products are found and taken into custody, and the owner thereof shall not be known to the officer finding the same, such officer

shall immediately procure from the county judge of the county wherein they were found an order forfeiting said salt water products, seines, nets, traps, boats, motors or other fishing devices to the board. All things forfeited under the provisions of this act may be destroyed, used by the board or disposed of by gift to charitable or state institutions, or sold and the proceeds derived from said sale deposited in the state treasury to the credit of the conservation fund. * * *

The provision of the above quoted statute providing for a judicial declaration confiscating and forfeiting the declared nuisance or nuisances apparently operates in a similar manner of a common law forfeiture in that it does not attack in rem, but is a part and parcel or at least a consequence of the judgment of conviction. In this type forfeiture, the specific property used by a person in the commission of or in connection with the commission of a crime of which he is convicted is forfeited and confiscated under specific statutory authority in a proceeding ancillary to the criminal conviction. The court has no discretion but to issue an order forfeiting the seized property. (See 37 C.J.S., 4 and 5, Sec. 1 and 2, Forfeitures.)

It should be noted that the above procedure for the forfeiting of seized property as outlined in the statute (also designated §370.02(11), F.S., 1953) is entirely different than that provided for in Ch. 28073 pertaining to our beverage laws and Ch. 562, F.S. In the latter case, an extensive procedure is detailed to be followed in the forfeiture of property seized. It is actually a proceeding in rem (against the property) and is not connected with or dependent on conviction in a criminal proceeding.

Due to the fact that the confiscation and forfeiture is imposed along with the arrest and conviction as a part of or at least ancillary to the criminal proceeding, it seems that the judge or clerk who is paid a flat fee for his services in a criminal case would not be entitled to any fee for his services in connection with the confiscation and forfeiture in the absence of specific statutory authorization of an additional fee which has not, in this instance, been provided for. Question one, therefore, should, we think, be answered in the negative.

It necessarily follows that the answer to Question two, because of the conclusions which have been reached with reference to Question one, becomes moot.

Under statutes which provide for the forfeiture of property used for or in connection with specified unlawful purposes or acts by proceedings against the property itself, the proceedings are in rem. In such proceedings the thing is primarily considered as the offender, or rather the offense is attached primarily to the thing. (See 37 C.J.S. 6.)

Confiscation and forfeiture proceedings under §370.02(11), F.S., supra, when not imposed as an incident or is ancillary to arrest and conviction should be considered in rem proceedings

against the property itself. In those cases in which the county judge has jurisdiction it would seem that fees payable in connection with the proceedings not connected with arrest and conviction would be payable by the person instituting the action. When instituted by the State Conservation Agency, they may be paid from funds appropriated to be used by the Board for payment of expenses incurred in the enforcement of the law. This conclusion seems to be the intent of the Legislature as it must be presumed that the Legislature intended that expenses and fees incurred in the enforcement of the law should be paid. In view of the fact that confiscation proceedings, when not in conjunction with arrest and convictions are in the nature of civil proceedings, the county judge is, in the absence of specific legislation on the subject, entitled to the same fee in confiscation proceedings as he is entitled to in other civil actions.

In light of the foregoing observations we think Question one should be answered in the negative, that Question two becomes moot, and that Question three is answered by the conclusions reached in the preceding paragraph.

June 17, 1954.—054-145.

STATE BOARD OF CONSERVATION—CONTRACTS—
UNIVERSITY OF MIAMI MARINE LABORATORY—
APPROPRIATION—FISHERIES RESEARCH

QUESTIONS: 1. Do §§1 and 3 of the contract mean that all appropriations for fisheries research made by the Legislature during the life of the contract are under contract to be used by the University of Miami Marine Laboratory as the research agency of the State of Florida?

2. Can the State Board of Conservation use said funds listed in said contract to contract with any other research laboratory or institution for fisheries research?

3. What legal interpretation do you place on §§6 and 7 of the contract?

To: *Honorable Charlie Bevis, Director, State Board of Conservation:*

Replying to Question One, I desire to quote §§1 through 3 of the said contract, as entered into by the contracting parties on May 11, 1954. The sections of the contract pertinent to this opinion are the same as embodied in previous contracts between the State Board of Conservation and the University of Miami.

"1. That this agreement between the State Board of Conservation and the University of Miami, Inc., be entered into for the purpose of carrying out scientific research for the conservation and development of the marine fisheries of Florida as authorized under §§370.02, 370.16(33) and 282.01(11), F.S., 1953.

"2. The agreement shall remain in effect for a period from date to July 1, 1956, and the State shall have the right to renew it for further periods of two years.

"3. Expenditures under this agreement shall be limited to the amounts already specifically appropriated or that may be appropriated, during the term of this contract, by the Legislature for fisheries research, also any funds otherwise released by the State Board of Conservation. Such funds already appropriated are set forth in sections of the Florida Statutes listed in Section 1 of this agreement."

Sections of the Florida Statutes referred to in the contract, as quoted, relate to the following subjects: Section 370.16(33), F.S., 1953, (formerly §375.37, F.S., 1951) provides that any and all funds derived from the sale of dead shell from the sovereignty lands of the state are appropriated for the use of financing biological research for fisheries, oysters and shrimp within the jurisdiction of this state.

Section 282.01(11), F.S., 1953, appropriated \$90,000 to the State Board of Conservation for biological research for the current biennium of 1953-1955. Section 370.02, F.S., 1953, does not appropriate any moneys but merely authorizes the Board to spend money for biological research. Said section provides that the Board shall "conduct scientific, economic and other such studies and research."

The contract as worded designates the Marine Laboratory of the University of Miami as the fishery research agency for the State Board of Conservation and authorized the said University of Miami to do the Board's research to the limit of all funds appropriated by the Legislature for marine biological research.

It is well known to the State Board of Conservation that the University of Miami has to know what funds are available under the contract in order that proper budgets and research programs may be planned. Sometimes scientific studies require long range planning, therefore, it is mandatory that a definite sum be in sight to sustain such plans. Inasmuch as appropriations are made two years in advance by the Legislature, this has been made possible. Accordingly, your first question is answered in the affirmative.

Your second question is answered in the negative as it is no more reasonable to assume that the state should take funds already contracted for under this contract and use them for other purposes, than it is to say that the state should break other contracts by taking the funds under contract and spending them elsewhere. The contract does not preclude other fishery research agencies of the state, if any, to secure an additional legislative appropriation, or to enter into a contract with the State Board of Conservation for the use of funds so appropriated.

Sections 1 and 3 of the contract mean in substance that the State Board of Conservation has contracted with the University of Miami to do its fishery research work, within the limits of moneys appropriated for such work by the Legislature, during the term of the contract.

Section 6 of the contract provides:

"At the beginning of each twelve month period a statement of proposed research and an estimate of expenditures shall be prepared under the direction of the Supervisor for his approval."

The section merely means that a plan of research and the estimated cost will be made at the beginning of each twelve month period. The proposed fishery program for 1953-1954, submitted by the University of Miami and approved by you on June 19, 1953, constitutes such a statement and estimate as contemplated by the contract.

Section 7 of the said contract provides:

"The research carried out under this agreement shall be limited to the program approved by the Supervisor of the State Board of Conservation, except in cases where the program shall be modified at the request of, or with the approval of, the said Supervisor."

This provision of the contract makes the program flexible, in that unforeseen circumstances may necessitate a change from one type of study to another. For instance, it is my understanding that after the proposed program for 1953-1954 was approved the Supervisor of Conservation requested that some work on the blue crab be added. This was done.

Reasonable notice of modification of the contract due to unusual conditions or emergencies shall be given by the Supervisor of the State Board of Conservation to the University of Miami.

October 22, 1953.—053-285.

DISABLED VETERANS—LICENSES—EXEMPTIONS

QUESTIONS: 1. Are disabled veterans or veterans of foreign wars exempt from purchasing any of the licenses required under Ch. 28145, subsections (6) and (7), Acts of 1953?

2. Is there any exemption from the purchase of licenses provided for in Ch. 28145, subsections (6) and (7), Acts of 1953, due to the age of the applicant or for any other reason?

To: Honorable Charlie Bevis, Director, State Board of Conservation:

Chapter 28145, subsections (6) and (7), Acts of 1953, provides for licenses for boats, nets, seines, seafood dealers, etc. Said Ch. 28145, Acts of 1953, which will be entered in the official Florida Statutes as Ch. 370, entitled "Salt Water Fisheries and Conservation", became a law on August 5, 1953, and was a complete revision of the Florida Statutes relating to salt water fisheries and conservation. All laws, whether general, local, special, general laws of local application in conflict with the chapter or any rule or regulation made pursuant thereto were repealed. (See §3 of Ch. 28145.) I do not find any exemptions for veterans in the chapter. All exemptions previously allowed veterans in the laws relating to salt water fisheries were deleted and any law or exemption in conflict with Ch. 28145 is ineffective or repealed.

This office has made a careful study of all general statutes relating to veterans and we do not find any provision that would exempt veterans from purchasing the licenses provided for in subsections (6) and (7), Ch. 28145, Acts of 1953.

The exemptions allowed veterans, cripples, aged, deaf, dumb and invalids in §§205.15 and 205.16, F.S., would not apply in this matter as that appears to be an exemption under certain circumstances and conditions from payment of ordinary occupational licenses assessed and collected for state, county and municipal purposes. Section 205.16 gives to war veterans exemption from occupational license taxes up to the sum of \$50. The said exemption is not applicable to regulatory fees or license taxes which do not come within the purview of the said sections. Sections 205.15 and 205.16, F.S., are exemption statutes and should be construed strictly in favor of the State. The exemption from occupational license taxes does not extend to other fees authorized by law.

Section 205.13, F.S., provides as follows:

"Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes *shall be in addition to and not in lieu* of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law." (Emphasis supplied.)

The annual license payable to the State Board of Conservation is within the category of fees or licenses for regulatory purposes.

Accordingly, your first question is answered in the negative.

In reply to your second question, I wish to advise that I do not find any exemption from the purchase of the licenses provided in subsections (6) and (7) because of age or other reasons.

Your second question is answered in the negative.

July 31, 1953.—053-177.

SALT WATERS OF BROWARD COUNTY—JURISDICTION

QUESTIONS: 1. Does a constable have the right to go out in the waters of the Atlantic Ocean, one half mile off the shore line of Broward County, Florida, and apprehend occupants of fishing boats whom the constable feels are violating Chapter 25713, Special Acts of 1949, which prohibits the setting or fishing of any traps in the salt waters of Broward County for the purpose of taking or catching crayfish?

2. What constitutes the "salt waters" of Broward County, Florida?

To: Honorable Frank S. Cannova, Assistant State Attorney, Broward County, Fort Lauderdale, Florida:

Chapter 25713, Special Acts of 1949, prohibits the setting or fishing of traps of any kind in the salt waters of Broward County, Florida, for the purpose of taking crayfish. A penalty is provided

in §2 of the act, thus making it a criminal law. Therefore, if a constable goes into the waters of the Atlantic Ocean one half mile off the Broward County shore line and finds that the law is being violated and the act is committed in his presence, it is my opinion that he has the authority to make an arrest for such violation. This answers your first question.

In reply to your second question, I call your attention to Art. I, Consti. of Florida, which sets forth the boundary of Florida, and to §7.06, F.S., which defines the boundary of Broward County, Florida.

As you know, this office has been very active in helping to obtain jurisdiction over the tidelands vested in the states and in all arguments and briefs presented by this office, we have taken the position that the State of Florida's eastern boundary and jurisdiction extends one marine league from the shore into the Atlantic Ocean. In other words, we recognize the national maritime belt as our eastern boundary. Therefore, it is my recommendation that for the purpose of enforcing criminal laws and jurisdiction over our fisheries you recognize the boundary of Broward County as extending one marine league into the Atlantic Ocean. This, together with any other water that is unfit for human consumption due to its saline content, would constitute the salt waters of Broward County, Florida.

September 3, 1953.—053-228.

LICENSE TAXES—BOATS—SALT WATER FISHING

QUESTION: Is a boat required to pay a license as provided in Ch. 28145, subsection 6, paragraph 1, Acts of 1953, when said boat takes fish from outside the territorial waters of the State of Florida but docks and lands its catch in the State of Florida?

To: *Honorable A. L. Porter, County Judge, Wakulla County, Crawfordville, Florida.*

Chapter 28145, subsection 6, paragraph 1, Acts of 1953, provides as follows:

“(1) Tax on all boats operated on non fresh waters.—

“That from and after the passage of this act, there shall be a license required of all boats, vessels, schooners and launches *equipped to take salt water products from the tide or salt waters of the State of Florida.* All such boats, vessels, schooners or launches before beginning activities or operating must first procure a license from the director of conservation, and for this purpose the owner or owners, captain or agent of such boat, vessel, schooner or launch must present in writing to the said director an application setting forth the name, number, if any, and description of such boat, vessel, schooner or launch, name and post office of owner or owners, together with such further data or information as the director shall deem necessary, upon blanks to be furnished by the director

and thereupon the director shall register such boat, vessel, schooner or launch and issue necessary license upon the payment therefor and all licenses shall be issued and granted to the boat, vessel, schooner or launch according to the following schedule:

Commercial boats under sixteen (16) feet long and under four (4) feet beam, one dollar and five cents (\$1.05); all boats over sixteen (16) feet long and over (4) feet beam, twenty cents (20¢) for each additional foot or fraction thereof of length or beam." (Emphasis supplied)

In view of the foregoing section, it is my opinion that all *boats*, vessels, schooners and launches are subject to the license provided in said section, if said boats, vessels, schooners and launches are equipped to take salt water products from the tide or salt waters of Florida and said boats are found in the territorial waters of Florida either by plying same, or using Florida dock facilities. The fact that the boats, vessels, etc. are not actually used for fishing or taking fish from the territorial waters of Florida does not exempt said boats, vessels, etc. from the license herein provided.

January 29, 1953.—053-19.

SALT WATER FISH—WHOLESALE DEALERS—PERMIT
TAGS—REQUIREMENTS—§374.32, F.S.

QUESTION: What disposition should be made of salt water fish that are being transported by a wholesale dealer without official permit tags?

To: *Honorable Charlie Bevis, Supervisor, State Board of Conservation:*

Section 374.32, F.S., provides, among other things, that a wholesale seafood dealer shall procure a permit as a prerequisite to securing a license. It further provides that it is unlawful to sell, deliver, ship or transport, or to possess for the purpose of selling, delivering, shipping or transporting any fish, seafood or other products of the salt waters of Florida without all invoices and containers of such products having thereon the wholesaler's permit number in such forms as may be prescribed by the Supervisor of Conservation; and any of such products found in the possession of any person in violation of this provision, may be seized by the Supervisor of Conservation or any conservation agent and sold to the highest bidder, on twenty-four hours' written notice posted at the place of seizure.

Excepted from the foregoing are licensed retail dealers selling and delivering such products to consumers in ordinary retail transactions, persons exempt from the payment of a license tax, and persons selling or delivering their own catch to a Florida licensed dealer. (Hall v. Caldwell, 37 So. 2d 421.)

In view of the foregoing, it is my opinion that the Supervisor or his agents may seize and sell, in the manner prescribed, any salt water products that are sold, transported or possessed not

complying with §374.32 in regards to the obtaining and use of a permit number.

August 5, 1954.—054-187.

SEAFOOD DEALER—FOREIGN SALT WATER CRAWFISH
—RESHIPMENT DURING CLOSED SEASON

QUESTION: Under the statutes of Florida may a seafood dealer receive, process and reship "foreign" salt water crawfish for commercial purposes during the closed season between the 15th day of April and the 15th day of August each year?

To: Honorable Charlie Bevis, Director, State Board of Conservation, Tallahassee, Florida:

Section 370.14(1), F.S., provides in part that "No salt water crawfish may be taken from the waters of this state for commercial purposes and no person may have same in his possession, *'regardless of where taken'*, between the 15th day of April and the 15th day of August each year." (Emphasis supplied.)

Section 370.14(2), F.S., provides in part as follows:

"No common carrier or employee of said carrier may carry or knowingly receive for carriage or permit the carriage of any crawfish, regardless of where taken, between the 15th day of April and the 15th day of August of each year, *'except crawfish lawfully imported from a foreign country for reshipment outside of the territorial limits of the State of Florida'*; but in no case will such shipment be permitted to pass through the territorial limits of the State of Florida unless accompanied by certified invoice and same must be shipped from the port of entry..." (Emphasis supplied.)

Rule No. 5 of the State Board of Conservation which took effect April 15, 1954, a rule to implement §§370.13 and 370.14, F.S., prescribed the manner in which a seafood dealer may have in his name or possession salt water crawfish during the closed season, between April 15th and August 15th each year. Possession of salt water crawfish during the closed season, permitted by Rule No. 5, applies *only* to crawfish which were in the possession of a seafood dealer before the beginning of the closed season.

It is equally clearly apparent that the Legislature intended to prohibit the taking or possession of salt water crawfish for commercial purposes after the beginning of the closed season, regardless of where taken, or when taken, which would include both domestic and foreign crawfish.

It is, therefore, my opinion that with the exception of the transportation by common carrier of crawfish lawfully imported from a foreign country for reshipment outside of the territorial limits of the State of Florida from ports of entry, no seafood dealer or other person may receive, process or re-ship foreign salt water fish for commercial purposes during the closed season between April 15th and August 15th each year.

August 10, 1954.—054-193.

STATE BOARD OF CONSERVATION OR GAME AND FRESH
WATER FISH COMMISSION OFFICERS—
POWERS OF ARREST

QUESTION: Should arrest warrants be issued by a magistrate upon lawful arrest without warrant by the Director of the State Board of Conservation or any of his officers, or the Game and Fresh Water Fish Commission or any of its duly authorized conservation agents?

To: *Honorable R. M. Witherspoon, County Judge, Franklin County, Apalachicola, Florida:*

Section 372.07, F.S., authorizes the Game and Fresh Water Fish Commission and its duly authorized conservation agents to arrest upon probable cause without warrant, in these words:

"The game and fresh water fish commission and each and every of its duly authorized conservation agents, have power and authority, throughout the state, to enforce all laws relating to game, non-game birds, fresh water fish and fur-bearing animals, and in connection with said laws, in the enforcement thereof and in the performance of their duties thereunder, to... arrest upon probable cause without warrant any person found in the act of violating any of the provisions of said laws..."
(Emphasis supplied.)

Section 370.02(7), F.S., makes applicable to the Director of the State Board of Conservation and his officers the powers of arrest as are applicable to peace officers, in these words:

"All conservation officers, together with the director are constituted police officers with power to make arrests for violations of the laws of this state and the rules and regulations of the board under their jurisdiction. The general laws applicable to arrests by peace officers of this state shall also be applicable to said director and conservation officers..." (Emphasis Supplied.)

The Director of the State Board of Conservation and his officers, and the Game and Fresh Water Fish Commission and its duly authorized conservation agents are *peace officers* within the meaning of §901.15, F.S., and as such have authority to arrest without warrant under the provisions of said section.

The procedure to be followed by an arresting officer upon arrest without warrant is found in §901.23, F.S., in these words:

"An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or

unable to act, before the nearest or most accessible magistrate in the same county."

The only purpose of an arrest warrant is to authorize the arrest of a person who is charged with a crime. Once an arrest has been made without a warrant under authority of §901.15, F.S., the need of an arrest warrant in law or in fact does not exist. Therefore, your question is answered in the negative.

August 6, 1954.—054-191.

SEAFOOD DEALER—LICENSES—SALT WATER FISH

QUESTIONS: 1. Under §370.07(1), F.S., what type of seafood dealer's license is required of a person who takes salt water fish or other salt water products from the public waters and water bottoms of Florida and sells his catch directly to the consumer?

2. Under the provisions of §370.07(1), F.S., are all seafood products required to pass through the hands of a licensed wholesale seafood dealer?

To: *Honorable Charles Bevis, Director, State Board of Conservation, Tallahassee, Florida:*

Section 370.07(1) (a), F.S., provides as follows:

"(a) A 'wholesale seafood dealer'; any person, firm or corporation which *sells* salt water fish or other salt water products to any person, firm or corporation except to the consumer; provided that *any person who takes salt water products and sells 'his catch' to other than a licensed wholesaler, shall be considered a wholesaler himself, and as such shall be required to purchase a wholesale seafood dealer's license*; further provided that said license is required for wholesale dealers having no established place of business and operating from trucks or other means of transportation." (Emphasis supplied.)

Section 370.07(1) (b), F.S., provides as follows:

"(b) A 'retail seafood dealer' is any person, firm or corporation who sells salt water fish or other salt water products directly to the consumer as either seafood or bait, but no license shall be required of dealers in merchandise who deal in or sell only salted, cured or canned seafood."

Under the above statutes, it appears that any person, firm or corporation which sells salt water fish or other salt water products to any person, firm or corporation, *other than to a consumer* is a wholesale seafood dealer. In this situation the *taking* of salt water fish or salt water products is not a determining factor as to who is a wholesale seafood dealer.

Also, it appears, under the above cited statutes that any person who *takes* salt water products and *sells "his catch" to anyone other than to a licensed wholesaler, would be considered a wholesaler himself, and as such he would be required to purchase a wholesale seafood license.*

Under the first clause of subsection (a) referred to above, it is implied that anyone who sells, without regard to *taking*, salt water fish or salt water products to consumers is a retailer as is demonstrated in subsection (b) of the above referred statute. Under the second clause of said subsection (a), one who *takes* salt water fish or salt water products and *sells* his catch to anyone, other than a licensed wholesaler, becomes a wholesaler. The provisions of *taking and selling to anyone other than a licensed wholesaler* inescapably includes consumers, and the selling of said fish and products to a consumer in nowise excepts anyone from being a wholesaler who *takes and sells* such fish and products.

Therefore, upon the above observations and authorities, it is my opinion that a person who takes salt water fish or salt water products from the public waters and water bottoms of Florida and sells his catch directly to a consumer, or to anyone else other than a licensed wholesaler, is himself a wholesale seafood dealer, and he is required to purchase a wholesale seafood dealer's license.

As to Question Two, it is answered in the negative as it is obvious that to require all seafood products to pass through the hands of a licensed wholesale seafood dealer would require all seafood products taken from the public waters and water bottoms of Florida by all individuals of the State to pass through licensed wholesale seafood dealers. I know of no provision which would require such.

In the absence of factual situations to be interpreted in relation to license requirements for seafood dealers, I refer you to §370.07, F.S., for type licenses required of seafood dealers.

August 6, 1954.—054-190.

CANAVERAL PORT AUTHORITY—SALT WATER FISH— REGULATIONS—UNDER §370.02, F.S.

QUESTION: May the Canaveral Port Authority prohibit the taking of salt water fish from waters and water bottoms within the area of the Canaveral Port District?

To: *Honorable Charlie Bevis, Director, State Board of Conservation, Tallahassee, Florida:*

The Canaveral Port District in its present form was created with the enactment of Ch. 28922, Laws of Florida, Special Acts, 1953.

Section 5 of Art. IV of the Act empowers the Canaveral Port District as follows:

"Section 5. To exercise such police powers as the Port Authority shall determine to be necessary for the *effective* control, regulation and protection of Port Canaveral; and for the effective exercise of jurisdiction over said port." (Emphasis supplied.)

Section 10 of Art. IV of said Act provides as follows:

"Section 10. The Port Authority is hereby authorized

and empowered to make rules and regulations consistent with the Constitution and Laws of the State of Florida, and the Constitution and Laws of the United States of America, for the promotion and conduct of navigation, commerce and industry in said Port Canaveral; and said rules and regulations shall be *reasonable* and shall apply uniformly to all similarly situated." (Emphasis supplied.) Section 11 of Art. IV of said Act provides as follows:

"Section 11. The Port Authority is hereby authorized and empowered to make rules and regulations governing the course, conduct, movement, stationing and restationing, berthing and reberthing, fueling and refueling, loading, unloading and reloading, docking, storing, mooring, and anchoring of ships, vessels, crafts, barges, skiffs and boats within said Port Canaveral and the navigable waters over which the said Port Authority has jurisdiction; to remove all obstacles to navigation, commerce and industry in the waters of said Port Canaveral and the navigable waters over which the said Port Authority has jurisdiction; *provided, however, this power can only be exercised within navigable waters, entrance channels, turning basins and slips in the waters of the said port.*" (Emphasis supplied.)

Section 17 of Art. IV of said Act provides as follows:

"Section 17. The Port Authority is authorized and empowered to regulate the speed, operation, docking, storing and conduct of all water craft of any kind plying or using *waterways* within said port and over which the Port Authority has jurisdiction *provided, however, this power shall be exercised only within navigable waters, entrance channels, turning basins, slips in the waters of the port.*" (Emphasis supplied.)

The duties of preservation, protection and management of salt water fish and fishery resources in the State of Florida, are lodged with the State Board of Conservation. Said board is empowered to regulate the operation of all fishermen and vessels of the state engaged in the taking of such fish and fishery resources within or without the boundaries of state waters (see §370.02, F.S.).

However, it appears that the right of taking salt water fish from the waters and water bottoms from Canaveral Port District may not be exercised in a manner that would impair the "*effective control, regulation and protection of Port Canaveral*" in derogation to the provisions of §5, Art. IV of the Act.

The Act authorizes and empowers the Port Authority to make rules and regulations to carry out all necessary functions in the operation of a port, with the proviso that said rules and regulations shall be *reasonable*, and that such powers to make rules and regulations *can only be exercised within navigable waters, entrance channels, turning basins and slips* in the waters of the Port District (see §10 and 11, Art. IV of the Act).

It appears that the Port Authority, under its rule making power, can prohibit the taking of salt water fish or any other activity "within navigable waters, entrance channels, turning basins and slips" where such taking would impair, hinder, interfere with or obstruct the necessary functions of port operation. But, any rule that would prohibit the taking of salt water fish in areas of the Port District would have to demonstrate that it is a *reasonable* rule, necessary for proper port operation.

I find no provision, express or implied, in the Act which would authorize the Canaveral Port Authority to regulate the taking of salt water fish within the port area, unless such taking of salt water fish interferes with port functions and the Port Authority's duties in the promotion and conduct of navigation, commerce and industry in the Port District.

Your question is answered accordingly.

FLOOD CONTROL

January 14, 1954.—054-5.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT—BOARD OF GOVERNORS—FUNDS —DEPOSITORIES

QUESTION: May the Board of Governors of the Central and Southern Florida Flood Control District, under the provisions of Ch. 378, F.S., 1951, or under the provisions of §665.44, F.S., 1951, invest funds of the District in the purchase of share accounts of Federal Savings and Loan Institutions chartered by the Home Loan Bank Board pursuant to §5, Act of Congress approved June 13, 1933, as amended, and popularly known as Home Owners Loan Act of 1933?

To: *Board of Governors, Central and Southern Florida Flood Control District, West Palm Beach, Florida:*

The authorities are generally agreed that statutes that authorize the use of public funds in carrying on an enterprise of a private nature or assisting such an enterprise or business by making loans or subscribing for capital stock are invalid in the absence of a constitutional provision authorizing such loan or investment of public funds. It is further universally held that Boards or officials in control of public funds are governed by strict regulations in regard to depositories and deposits of such funds therein or in banks other than designated depositories, and they have generally been held without power to deviate from the letter of the governing statute, except where such action appears in the eyes of the court to be justified by the necessities of the occasion.

Section 378.33, F.S., 1951, which authorizes the Governing Board of Central and Southern Florida Flood Control District to select depositories in which funds of the Board and of the District shall be deposited reads:

"... The said board is hereby authorized to select as depositories in which the funds of the said board and of the said district shall be deposited any banking corporation organized under the laws of the State of Florida or under the national banking act, doing business in the State of Florida, upon such terms and conditions as to the payment of interest by such depository upon the funds so deposited as the said board shall deem just and reasonable and also upon such terms as to security by such depository as the said board shall deem proper, which security may be either by satisfactory individual or surety bonds or by the deposit with the treasurer of bonds of the district issued by said board, or bonds of the United States."

It clearly appears that the authority granted by the statute is limited to the selection as a depository for public funds "any banking corporation organized under the laws of the state of Florida or under the national banking act, doing business in the state of Florida." This clearly confines the Board in its selection of a depository to the two classes specified in the act, that is, any banking corporation organized under the laws of the state or any banking corporation organized under the national banking act of the federal government doing business in the state of Florida. The Federal Home Owners Loan Act of 1933 and particularly that section thereof providing for the organization of Federal Savings and Loan Associations reads as follows:

"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, ... of 'Federal Savings and Loan Associations' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

This statute further provides:

"Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."

It has been held by the Federal Courts that Federal Savings and Loan Associations do not do a general banking business but are set up under the declared congressional purpose to provide thrift institutions in which people may invest their funds and provide for the financing of private homes, and further that under the applicable section a Federal Savings and Loan Association is not a national bank.

Boards or officials having charge of public funds are without power to depart from the literal requirements of the statutes as to their choice of depositories.

Applying the foregoing principles to the question presented, the conclusion is inescapable that under the terms of the applicable statute the Board is not authorized to use public funds for the purpose of purchasing as an investment shares of a Federal Savings and Loan Association, the extent of their authority being limited to the deposit of such funds in any state bank or any national bank doing business in the state of Florida.

Section 665.44, F.S., 1951, provides that any and all boards of supervisors for drainage districts and other taxing units, officers or officials, by whatever name known, having the custody, control, supervision, management or authority to invest any fund or funds, may invest any such fund or funds in investment share accounts of any Federal Savings and Loan Association chartered under the laws of the United States of America, and doing business in the State of Florida, and in the shares of any Florida building and loan association which is a member of the Federal Home Loan Bank System.

The last cited statute acts to authorize the specified Boards and other taxing unit officers to invest the public funds in their hands. This statute was enacted at the 1937 session of the Legislature. The statute authorizing the Board of the Flood Control District to select a depository for its funds was enacted at the 1949 session of the Legislature and contains a repealing clause repealing all laws or parts of laws in conflict therewith. The particular limitation of the statute governing the Flood Control District to the authority of the Board to deposit public funds in any banking corporation organized under the laws of the state or the federal government has the effect of limiting the authority not only to the deposit of funds but also as to the particular institutions selected as depositories.

In the light of the applicable statutes and of the general purpose of law governing, your question is answered in the negative.

CHAPTER XXVII

PUBLIC HEALTH

FLORIDA CRIPPLED CHILDREN'S COMMISSION

June 8, 1954.—054-134.

FLORIDA CRIPPLED CHILDREN'S COMMISSION— I. DAVID COSSON—TREATMENT—EXPENSES —REIMBURSEMENT

QUESTION: What is the legal relationship of the State of Florida to Isaac David Cosson with respect to his or his guardian's legal duty to repay the Florida Crippled Children's Commission for sums expended on Cosson to correct a physical disability?

To: Honorable H. W. Tarkington, Colonel, Artillery Chief, Florida Military District, Jacksonville, Florida:

Section 391.07, F.S., 1953, provides in part that upon proper certification a child will be treated without cost in the event a parent or one standing in loco parentis is financially unable to pay for same. *There are no provisions* in Ch. 391 that provide for a refund to the Commission in the event said parents are subsequently financially able to repay a portion of the costs expended.

Section 391.07, F.S., 1953, *supra*, also provides in part as follows:

"... Children whose parents or those in loco parentis are financially able to pay in part for such treatment may be cared for and treated by the Commission under such rules and regulations as may be prescribed by said Commission."

The above would imply that the Commission can enter into a contract whereby the parents are to reimburse the Commission in part or in whole for services rendered. Under a situation where a contract has been entered and action for breach of contract against parents or guardian would lie on the part of the Commission. However, if such a contract is entered into on behalf of the child by a natural or court appointed guardian, the same must be approved by a competent court. (§744.13, F.S., 1953.)

Your attention is invited to an analogous situation in which the Supreme Court has rendered a decision. In *Warren v. Pope*, 64 So. 2d. 564 and the following case of *Warren v. Rhea*, 64 So. 2d. 567, the court held in effect that the estate of an incompetent was not liable for his care while in the State Mental Hospital unless such assurance had been given by someone legally responsible for the incompetent. The same would undoubtedly apply with respect to minors under legal disabilities.

In view of the foregoing and the facts stated in your letter, it is my opinion that a relief bill such as is now pending in Congress

would lie to make restitution to Isaac David Cosson or his family for damage or injury, if any, sustained due to the bombing, rather than for repayment to the Crippled Children's Commission. However, I do not know of any legal reason why the State could not be voluntarily reimbursed by the United States for its expense.

FLORIDA STATE HOSPITAL

June 30, 1953.—053-140.

INCOMPETENCY PROCEEDINGS—EXAMINING COMMITTEE —COMPENSATION—§394.23(2) F.S. AMENDED— SENATE BILL 275 LEGISLATURE 1953

QUESTION: Does Senate Bill 275 enacted by the 1953 session of the Legislature repeal Ch. 22956, Acts of Florida, 1945, as amended by Ch. 24286, Acts of Florida, 1947?

To: *Honorable Wm. C. Brooker, County Judge, Hillsborough County:*

Senate Bill 275 has become law on June 15, 1953, without the Governor's approval. Section 2 of the Act provides, "This Act shall repeal any law in conflict herewith." One of the fundamental rules of statutory construction is that the legislative intent must be ascertained and effectuated. (City of St. Petersburg vs. Siebold, 48 So. 2d. 291.) The Florida Supreme Court has held as follows in *Atkinson vs. State*, 23 So. 2d. 524:

"In *Florida East Coast Railway Company v. Hazel*, 43 Fla. 263, 31 So. 272, 274, 99 Am. St. Rep. 114, we said: 'Repeals by implication are not favored, and, in order that a court may declare that one statute repeals another by implication, it must appear that there is a positive repugnancy between the two, or that the last was clearly intended to prescribe the only rule which should govern the case provided for, or that it revises the subject-matter of the former.' Also see *Beasley v. Coleman*, 136 Fla. 393, 180 So. 625, *Wade v. Janney*, 150 Fla. 440, 7 So. 2d. 797."

As is thus apparent the courts do not look with favor upon implied repeals and the presumption is always against the intention of the Legislature to repeal legislation by implication. (Statutory Construction, Crawford, p. 630.)

The repealing clause of Senate Bill 275, §2 of the Act, does not expressly repeal Ch. 22956, Acts of Florida, 1945, as amended by Ch. 24286, Acts of Florida, 1947, and, therefore, there is the presumption against repeal by implication. Senate Bill 275 can only repeal these Acts if there is shown to be such a repugnancy between the two as to reveal a legislative intent that Ch. 22956, Acts of Florida, 1945, as amended by Ch. 24286, Acts of Florida, 1947, is to be repealed.

Chapter 22956, Acts of Florida, 1945, as amended by Ch. 24286, Acts of Florida, 1947, is a general law providing for the compensation of the examining committee in incompetency proceed-

ings to be \$10 for each physician committeeman and \$5 for each non-physician committeeman in counties of the state having a population greater than 150,000. The compensation of such examining committee in other counties of the state is governed by the provisions of §394.23, sub-section 2, F.S., 1951.

The title and §1 of Senate Bill 275 clearly indicate the legislative intent as provided for in the Act was to amend §394.23, sub-section 2, F.S. 1951. Section 1 provides that §394.23, sub-section 2, F.S. 1951, is hereby amended to read as follows:

"(2) Each examining physician on the committee shall receive not less than Ten (\$10.00) Dollars and not more than Twenty-five (\$25.00) Dollars each, and the other Committeemen shall receive Two (\$2.00) Dollars each. Each such physician shall receive the minimum sum herein provided except where the file of the proceeding discloses that the time required of the physician in the proceeding demands a greater sum; and in such event, the county judge shall certify to the Board of County Commissioners the sum to be paid to the physician, not to exceed the maximum herein provided."

In construing an act amendatory of a statutory provision, it is undoubtedly the rule that, when the Legislature declares an existing statute to be amended to read as follows, as was done here, that body evinces the intention to make the new act a substitute for the amended statute, exclusively; only those portions of the old law repeated in the new are retained, and all portions omitted are repealed. (State ex rel, Nagle, Atty. Gen. v. Leader Co. et al. 37 Pac. 2d. 561.) An act to amend a particular section of a general law is limited in its scope to the subject-matter of the section proposed to be amended. Such amendment *ex vi termini* implies merely a change of its provisions upon the same subject to which the original section relates. (State ex rel. Board of Education of City of Tulsa v. Morley et al, 34 Pac. 2d. 259.)

It is my opinion that in effectuating the legislative intent as expressed in Senate Bill 275, the Act only amends §394.23, sub-section 2, F.S. 1951, and the provisions of the Act itself do not sufficiently reveal a legislative intent to repeal the compensation paid to medical and non-medical committeemen of Ten and Five Dollars respectively in incompetency proceedings in counties, having a population greater than 150,000 as provided for in Ch. 22956, Acts of Florida, 1945, as amended by Ch. 24286, Acts of Florida, 1947.

TUBERCULOSIS SANATORIUM

February 23, 1954.—054-45.

TUBERCULOSIS SANATORIA—ADMISSION OF PATIENTS—
FUNDS CONTRIBUTED BY COUNTIES—RESIDENCE
REQUIREMENTS—JACKSON COUNTY

QUESTION: Is Jackson County responsible for payment of

hospital costs under the provisions of §392.07(1), F.S., wherein it was the committing county, but the patient had removed himself and his family from Jackson County to Alachua County one month prior to the commitment?

To: Honorable Jodie Sketo, Chairman, Board of County Commissioners Jackson County, Marianna, Florida:

Section 392.07(1), F.S. provides as follows:

"Any tuberculous person who has been an actual bona fide and continuous resident of Florida for one year may be admitted to the sanatoria by the state tuberculosis board under rules and regulations prescribed by the board; provided, the county sending such patient shall have assumed responsibility for, and made satisfactory financial arrangements with, the state tuberculosis board for the payment by such county of one dollar and twenty-five cents per diem hospital charges for each such patient." (Emphasis supplied).

At first glance the above question would seem to necessitate a discussion of residence or domicile in a county, however, a more careful study of Ch. 392 and more specifically §392.07, F.S., reveals that the residence requirement provides that one must be a resident of the *State of Florida for one year* in order to qualify for the lower per diem hospital rates, and there is no provision requiring any period of residence in a particular county.

Subsection 2 of the said §392.07 provides for admission of non-residents of the state. The only mention made with reference to counties is to provide duties that devolve upon a committing county. This duty is that the committing county shall assume responsibility for and make satisfactory arrangements with the State Tuberculosis Board for payment of per diem for committed patients.

It should be noted that in certain specific instances the Const. of Florida, as well as various acts of the Legislature, has provided for designated periods of time as a resident of state and county. Examples of this are Art. VI, §1, F. Const. and §97.041, F.S., relating to qualification of electors; §65.02 relating to divorce, and §352.57, F.S., relating to hunting and fishing licenses. Section 392.07(1), *supra*, is silent with regard to this matter.

The relationship between the several counties and the State Tuberculosis Board is contractual in nature. This relationship continues for the duration of confinement and treatment of the committed patient. This would be true even though the patient changed his domicile or residence after or before commitment. (See Attorney General's Opinion 052-266, copy of which is attached.)

A part of Opinion 053-148 reads as follows:

"When Orange County agreed to pay the \$1.25 per day for the patients now in the tuberculosis sanatoria of Florida such constituted a continuing agreement and shall continue until any of such patients are properly discharged

by the medical authorities of the hospital as no longer a danger to the public health."

In view of the foregoing, it appears that your question should be answered in the affirmative. However, as a practical matter for future consideration, it may be well for the county commissioners to inquire fully into the facts concerning residence prior to commitment in order that each county may more properly care for its own indigent.

December 11, 1953.—053-330.

STATE TUBERCULOSIS HOSPITAL—PATIENTS— COMMITMENT—RESIDENCE REQUIREMENTS

QUESTION: If a patient at the time of entrance into a state tuberculosis hospital has been a bona fide resident of the State of Florida for a period of ten months, does the time spent in said hospital by such a patient apply on the necessary time a person must reside in the state to come within the category set forth in §392.07(1), F.S.?

To: Honorable William N. Mapoles, Jr., Acting General Business Manager, State Tuberculosis Board, CAPITOL:

It is assumed from the above statement of fact that this patient has declared his intention of establishing his domicile in this state, and it is further assumed that the person has abandoned his old domicile and has actually resided in the state for the ten month period.

Your question necessitates a construction of both residence and domicile. Domicile denotes a fixed permanent residence, to which when absent, one has the intention of returning. Residence simply indicates the place of abode, whether temporary or permanent. (*Minick v. Minick*, 149 So. 483.) There is no definite period of time necessary to create a domicile and one day may be sufficient provided the intention to create a domicile exists. The habitation may not be continuous and temporary absence does not affect it. (17 Am. Jur. 604.) To abandon one's domicile there must be a choice of a new domicile with the intention that it be the principal and permanent residence, and the rule is well settled that a domicile once established continues until it is superseded by a new domicile and that the old domicile is not lost until a new one is acquired. (See *Minick v. Minick*, 149 So. 483, 111 Fla. 469; *Wade v. Wade*, 113 So. 374, 93 Fla. 1004.)

The Supreme Court of Florida said in *Minick v. Minick*, 149 So. 483:

"'Residence' as used in various statutes has been considered synonymous with domicile * * *. Generally where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent."

Therefore, in view of the foregoing it is my opinion that when a patient has been a bona fide resident of the State of Florida for ten months and said patient is certified by the county for commitment to one of the state tuberculosis hospitals under §392.07(2), F.S., which provides for the county to pay all the hospital charges, the patient's residence is not affected, and when such patient has been a bona fide resident of the state for a period of one year from the date of actually establishing his domicile in the state, he is entitled to hospitalization under the terms of §392.07(1), F.S.

Your question is answered in the affirmative.

September 15, 1953.—053-243.

STATE TUBERCULOSIS BOARD—NURSES SCHOLARSHIPS

QUESTION: What authority does the State Tuberculosis Board have to establish a nurses scholarship program and to spend the \$30,000 per annum appropriated by the 1953 Legislature for awards and scholarships?

To: *Honorable William H. Mapoles, Jr., Acting General Business Manager, State Tuberculosis Board:*

Chapter 392, F.S. creating and regulating the State Tuberculosis Board does not specifically provide for the awarding of nurses scholarships. However, it is to be noted that the said board does have broad powers to establish, conduct, maintain and operate tuberculosis hospitals and carry on a program to control tuberculosis in Florida.

Section 392.02, F.S., provides among other things that the State Tuberculosis Board shall be a body corporate and have and possess all the powers of a body corporate for all the purposes created by or that may exist under the provisions of Ch. 392, F.S., or any act or acts amendatory thereof. The Board has the power to contract and be contracted with, sue and be sued. Section 392.14, F.S., extended and broadened the authority of the State Tuberculosis Board and gave said board authority to use any sums of money which it may heretofore have saved or which it may hereafter save from its regular operating appropriation, or to use any sums of money acquired by gift or grant, or any sums of money it may acquire by the issuance of revenue certificates of the sanatorium to match or supplement any state or federal funds, or any moneys received by said board by gift or otherwise, for the construction and equipment of additional facilities as may be in the opinion of said board required or deemed necessary. Section 392.06, F.S., authorizes the State Tuberculosis Board to make rules and regulations for the control and operation of the tuberculosis hospitals.

As required by law, the State Tuberculosis Board submitted its biennial budget request to the State Budget Commission for the biennium, July 1, 1953 to June 30, 1955. \$30,000 for each of the fiscal years of said biennium was included for nurses scholarships.

The request was approved by the State Budget Commission and appears on page 103 of the Budget Commission's report to the

Legislature for said biennium. The 1953 Legislature in making its appropriation to the State Tuberculosis Board for said biennium appropriated the full amount for operating expenses as requested by the Board and as set forth on page 103 of the Budget Commission's report, which includes the scholarship fund, numbered as Object Code 4310, under Expenses.

It has been a long recognized fact that the State Tuberculosis Board has extreme difficulty in securing a proper, qualified nursing staff for the tuberculosis hospitals. This has been accredited largely to the shortage of nurses, however, the fact that they are hospitals for the treatment of a contagious disease may have something to do with the difficulty. Therefore, it appears entirely reasonable that the Board can better obtain nurses to staff the tuberculosis hospitals by helping to train nurses who contract to render services to the Board commensurate with the scholarship.

Therefore, in view of the foregoing, it is my opinion that the State Tuberculosis Board has the authority to establish the nurses scholarship program and to spend the \$30,000 per annum appropriated by the 1953 Legislature for that purpose. However, it is my firm recommendation that the Board proceed cautiously and set up a procedure for awarding scholarships on a highly competitive basis including a strict examination in order that there may be no discrimination or favoritism. It is suggested that you contact other agencies such as the State Department of Education and the state universities that have had experience in awarding scholarships. I am sure some helpful information could be obtained.

August 3, 1953.—053-180.

TUBERCULOSIS BOARD—DETENTION OF RECALCITRANT PATIENTS IN HOSPITAL—AUTHORITY CH. 392, F.S.

QUESTIONS: 1. What authority does the State Tuberculosis Board have to forcibly detain a patient committed to the State Tuberculosis Hospital under the recalcitrant patient law?

2. Does the State Tuberculosis Board have the authority to provide armed guards for the purpose of preventing committed patients from leaving the commitment ward?

3. If so, what instructions should the Board give to these guards as to the use of their arms in restraining a patient attempting to escape from a commitment ward?

To: *Honorable Robert G. Carter, Executive Secretary, State Tuberculosis Board, Jacksonville, Florida:*

Section 392.29, F.S., provides, among other things, as follows:

"The state tuberculosis board is hereby authorized and directed to provide adequate facilities for such compulsory isolation and treatment at one or more of the hospitals which are operated by it for the care and treatment of tuberculous patients." (Emphasis supplied.)

When a patient who has refused to voluntarily isolate himself

and receive treatment is committed to a State Tuberculosis Hospital under Ch. 392, F.S., the Board is charged with the duty and responsibility of providing adequate facilities to confine and treat such recalcitrant patient. The Legislature has left to the Board's discretion the matter of determining what constitutes adequate facilities for effecting such confinement. The law providing for compulsory isolation and treatment has been held constitutional by the Supreme Court of Florida (Moore v. Draper, 57 So. 2d 648) and follows a long line of court decisions throughout the land, whereby the state may, in order to protect the public health, commit and confine in jails and other detention units persons who are infected with contagious diseases. Specific attention is called to the much heralded "Typhoid Mary" case, wherein she was confined in a "common jail" for 20 years because she was a carrier of typhoid fever. In Varholy v. Sweat, 15 So. 2d 267, we find that the Supreme Court of Florida in habeas corpus proceedings denied bail in a criminal case of drunkenness because petitioner was found to be infected with a venereal disease. In denying bond the Court held: "The constitutional guarantees of life, liberty and property of which one may not be deprived without due process of law, do not limit the exercise of the police power of the State to preserve the public health" and in Ball v. Branch, 16 So. 2d 524, the Court held: "Since nothing is more important to the community than the health of the citizenry, constitutional provisions should be liberally construed to uphold acts designed to protect it."

There is no conflict of authority as to the authority of the Legislature to protect the health of the citizens of Florida by providing for compulsory confinement or isolation of persons infected with contagious and infectious tuberculosis. This was done when Ch. 26828, Acts of 1951, became a law, which answers your first question.

In reply to Question Two, it is believed that any law granting the right to forcibly isolate a tubercular person carries with it implied authority to provide adequate facilities for such compulsory isolation, including such guards as are necessary to keep such persons isolated or confined. Since the *law authorizes the Board to provide adequate facilities for compulsory isolation and treatment of patients committed under the recalcitrant patient law*, it appears that guards are necessary to keep such committed patients from leaving the commitment ward. It should be noted that such patients refused to voluntarily take treatment and had to be committed and isolated by court order. Such patients are committed by the court to the custody of the medical director of the hospital for quarantine, isolation and compulsory treatment for such period of time as shall, in the opinion of the medical director, be necessary to improve the health of such person so that he will not have active, infectious tuberculosis or will not be dangerous to the public health.

In reply to Question Three, it is my opinion that the guards should use their arms only in self defense or for the protection of other patients from a patient that may become violent and attempt to inflict bodily harm on the guard or some other patient,

doctor or employee of the hospital. I do not think a guard should resort to the use of firearms just to prevent a patient from escaping.

July 9, 1953.—053-148.

STATE TUBERCULOSIS BOARD—ADMISSION OF PATIENTS
—FUNDS CONTRIBUTED BY COUNTIES—RESPONSIBILITY
—ORANGE COUNTY

QUESTION: What effect does the resolution passed by the Board of Commissioners of Orange County, Florida, dated June 2, 1953, have on the State Tuberculosis Board, and what should the Board do to care for and treat the people of Orange County who are infected with contagious and infectious tuberculosis in the light of said resolution?

To: Honorable W. T. Edwards, Chairman, State Tuberculosis Board, Jacksonville, Florida:

Chapter 392, F.S., creates the State Tuberculosis Board and places on it the responsibility of building tuberculosis sanatoria, equipping same, and caring for and treating tubercular patients that are admitted. The chapter sets up certain procedures for admission of patients. Section 392.07, F.S., which provides for the admission of those patients that voluntarily seek treatment reads as follows:

“392.07 Admission of patients; funds contributed by counties.—

“(1) Any tuberculous person who has been an actual bona fide and continuous resident of Florida for one year may be admitted to the sanatoria by the state tuberculosis board ‘under rules and regulations prescribed by the board,’ provided, the county sending such patient shall have assumed responsibility for, and made satisfactory financial arrangements with, the state tuberculosis board for the payment by such county of one dollar and twenty-five cents per diem hospital charges for each such patient. If a person admitted to any of said sanatoria is able to pay all or any part of his or her per diem hospital charges, the county sending such patient shall collect the one dollar and twenty-five cents per diem required to be paid by the county, and the county shall retain the one dollar and twenty-five cents per diem to reimburse itself for the per diem charge it has paid or is obligated to pay for such patient. If the patient is able to pay more than one dollar and twenty-five cents on his or her per diem charge such additional payment shall be made to the state tuberculosis board.

“(2) The state tuberculosis board may also admit to any sanatoria operated by it any other tuberculous person who may be certified to the board by any county in the state, or by any agency of the federal government, upon such terms and conditions as may be prescribed by said

board and provided satisfactory arrangements are made with said board for the payment of all hospital charges for the care and maintenance of said tuberculous person while in the sanatoria." (Emphasis supplied.)

- Subsection (1) above relates to residents, whereas subsection (2) relates primarily to nonresidents.

As to whether or not a patient is financially able to pay for the treatment provided in Ch. 392, the Board of County Commissioners must make the determination based on the particular facts involved in each case after appropriate investigation of the circumstances. It then becomes the duty of the county, under §392.07, F.S., above quoted, to collect from those patients that are able to pay, and to pay for those that are not financially able.

The machinery by which the money is to be collected to *reimburse the county for the per diem charge it has paid or is obligated to pay* is a matter for the respective counties to set up. In the case of Orange County it has seen fit to set up a procedure set forth in a resolution dated June 2, 1953, part of which reads as follows:

"BE IT RESOLVED that all persons sent by Orange County to the State Sanatoria for in-patient or out-patient care and who are not certified by the Orange County Welfare Department and the Board of County Commissioners as being unable to pay any part of the cost of such treatment, shall deposit with the County a sum equal to the part of such cost assumed by the patient for four (4) months treatment and shall thereafter, on the first day of each month, pay to the County a sum equal to the part of such cost so assumed for one (1) month's treatment."

In 1949 the Legislature of Florida recognized the necessity of enacting a law providing for compulsory isolation and treatment of persons infected with active and infectious tuberculosis, who refused to take treatment on a voluntary basis. Tuberculosis was recognized as one of the most dreadful, contagious diseases and one of the greatest killers, therefore, the purpose of the act was to remove such persons from the public and thereby protect the public health. In 1951 the Legislature strengthened the compulsory isolation and treatment statute by enacting Ch. 26828, Acts of 1951, which reads, in part, as follows:

"Section 392.29 State tuberculosis board authorized to provide adequate facilities; payment of cost of treatment.—

"The state tuberculosis board is hereby authorized and directed to provide adequate facilities for such compulsory isolation and treatment at one or more of the hospitals which are operated by it for the care and treatment of tuberculous patients. *The cost of compulsory treatment, care, and maintenance of such persons at such state operated hospitals shall be provided for by the board of county commissioners of the county from which such patient is committed paying one dollar and twenty-five cents per day*

to the state tuberculosis board, and the remainder of such expense shall be paid for by the state tuberculosis board. *If such patient is able to pay all or any part of his per diem hospital charges, the board of county commissioners of the county from which he is committed shall collect and retain one dollar and twenty-five cents per day thereof to reimburse itself for the one dollar and twenty-five cents per diem charges it has paid or is obligated to pay for such patient to the state tuberculosis board.* If the patient is able to pay more than one dollar and twenty-five cents on his per diem charges, such additional payment shall be made to the state tuberculosis board." (Emphasis supplied.)

Under this statute it is mandatory on the counties to bear the cost as set forth. If the patient is able to pay, in whole or in part, it is incumbent upon the county to collect from the patient.

Particular attention is called to that part of the Orange County resolution which provides as follows:

"BE IT RESOLVED that upon failure of any such person to pay any monthly payment within twenty (20) days after its due date as above required, the Orange County Welfare Department is *directed to take steps to have such patient discharged from such care.*" (Emphasis supplied.)

These laws do not grant to the county, under either the voluntary or compulsory treatment statute, the authority to take persons infected with active and infectious tuberculosis out of the tuberculosis sanatoria and return them to society to go into public places, ride in common carriers, mingle with relatives and friends and the general public spreading this infectious disease, because the county is unable to collect from the so called financially able patient the \$1.25 per day. A patient who is able to contribute to his treatment should do so and it is up to the county to employ all legal means available to collect such contribution if it is not paid. The Supreme Court of Florida has denied release of tubercular patients in Habeas Corpus proceedings. (Moore v. Draper.)

When Orange County agreed to pay the \$1.25 per day for the patients now in the tuberculosis sanatoria of Florida such constituted a continuing agreement and shall continue until any of such patients are properly discharged by the medical authorities of the hospital as no longer a danger to the public health. The State Tuberculosis Board cannot legally discharge any of the patients sent to the sanatoria by Orange County. If need be, mandamus proceedings can be instituted by your Board to require the said county to fulfill its agreement as to *voluntary patients already committed and all patients now and hereafter committed under the compulsory isolation statute.* (See State ex rel Kennedy vs. Davis, 19 So. 2d 373.)

In so far as new cases are concerned the law unfortunately does not require the county to certify them notwithstanding the

menace they represent to the community by their non-isolation. This matter can only be corrected by new legislation.

It is well understood why the doctors at the tuberculosis sanatoria would be hesitant to start a long range treatment program such as the disease requires, under such a financial arrangement outlined in the resolution, for when the patient becomes delinquent the resolution provides that his discharge is to be sought. Suppose the patient had just been prepared for surgery or had just returned from surgery. Therefore, unless the financial arrangements made with Orange County for the treatment of voluntary patients are completely satisfactory to the State Tuberculosis Board (392.07) in the light of its responsibility to care for and treat tubercular patients, it is my opinion that the Board would be justified in refusing to take such patients.

The State has spent millions of dollars in an attempt to minimize this contagious disease. Therefore, it is hoped that by the State Tuberculosis Board and the counties working together as many patients as present facilities allow will be treated and cured of this dreadful disease.

CHAPTER XXVIII

SOCIAL WELFARE

DEPARTMENT OF PUBLIC WELFARE

October 26, 1953.—053-287.

STATE WELFARE BOARD—AID TO BLIND PERSONS— AID TO INMATE OF PUBLIC HOSPITAL

QUESTION: "Does subsection 3(c) of §409.17, as amended by Ch. 28229, Laws of 1953, prohibit the granting of aid to the blind to an inmate of a public hospital which is not 'a mental or tuberculosis medical institution' or to 'an inmate of an institution as a result of a diagnosis of psychosis or tuberculosis'?"

To: *State Department of Public Welfare, P.O. Box 989, Jacksonville:*

Subsection 3 of §409.17, as amended by Ch. 28229, and which names some of the disqualifying conditions, reads as follows:

"(a) Is not an inmate of any mental or tuberculosis medical institution, (b) is not an inmate of any institution as a result of a diagnosis of psychosis or tuberculosis, (c) is not an inmate of any public institution, (d) nothing herein shall prevent assistance to qualified persons who are patients in hospitals with the exception of (4) (a) and (4) (b) above."

While subsection 3(c) prohibits aid to "an inmate of any public institution", it will be observed that sub-section (d) provides that the Act shall not prevent assistance to qualified persons who are patients in hospitals with the exception of 4(a) and 4(b). It is quite clear that reference to 4(a) and 4(b) was intended to read 3(a) and 3(b).

The amended subsection does not prohibit the granting of aid to the applicant described in your question.

August 2, 1954.—054-182.

STATE WELFARE BOARD—MEMBERS—EXPIRATION OF TERMS

QUESTION: What are the dates of expiration of the terms of the present members of the State Welfare Board?

To: *Honorable C. C. Codrington, State Director, Department of Public Welfare, Jacksonville, Florida:*

The present Board memberships originated in Ch. 18285, Laws of 1937. Of the original appointments made under that act, three memberships expired in 1938, two in 1939, one in 1940 and one in

1941. All subsequent terms were and are for four years from the expiration of his predecessor's statutory term, without regard to whether a member's appointment may have been delayed, or when he may have qualified, or the date of his commission. The term of office is controlled by statutes regardless of how the commission may read.

Stated in different words, the memberships have expired, or will expire, as follows:

Three—	1938, 1942, 1946, 1950, 1954
Two—	1939, 1943, 1947, 1951, 1955
One—	1940, 1944, 1948, 1952, 1956
One—	1941, 1945, 1949, 1953, 1957

The 1941 revision of the statutes, §409.01, provides:

"State Welfare Board shall consist of seven members ... for terms of four years each, said terms to date from the present existing terms."

The 1951 amendment, Ch. 26937, Laws of 1951, used similar language. Neither the 1941 revision or the 1951 amendment made any change in the expirations of the several Board memberships. No other legislation or attempted legislation, since the enactment of Ch. 18285, Laws of 1937, has made any change in the expirations.

Regardless of when they may have been appointed, or what the commission may recite as to expiration of terms, the terms of your present members expire as follows:

John T. Murphy	July, 1954
Mrs. Christine Edenfield	July, 1954
Charles M. Phillips	July, 1954
T. R. Connell	July, 1955
Mrs. Charles A. Carroll	July, 1955
Charles O. Andrews, Jr.	July, 1956
Paul E. Raymond	July, 1957

You will observe that the present commissions appear to be correct as to expirations.

June 18, 1954.—054-149.

DEPARTMENT OF PUBLIC WELFARE—GRANTS—SURVEY OF ADOPTION—SPECIAL EMPLOYEES—SALARY LIMITS—DEPOSIT OF FUNDS

QUESTIONS: 1. Does the Department of Public Welfare have authority to accept a grant of money from a private foundation for a study or survey of the Florida Adoption Program?

2. Could such grant lawfully be deposited in a private bank rather than the State Treasury, to be disbursed by the Director of the Department and another officer, such as our Director of Finance and the unexpended balance to be returned to the donor foundation?

3. The research staff to be employed would be people of high professional status not currently employed by the Department of Public Welfare; probably two of the positions, that of the director and the psychiatrist, would command salaries of \$12,000 to \$15,000. Could salaries be paid in excess of \$10,000?

4. Would access by such special employees to the adoption records violate §72.27 of the F.S.?

To: Honorable C. G. Codrington, State Director, Department of Public Welfare:

In your letter of June 1st, following our conversations on May 28th, you explained in great detail the purpose of the survey, the manner in which it would be conducted, the cost, etc. Briefly stated, there is an opportunity to obtain a grant from a private foundation of \$75,000 to \$100,000 for research by highly trained persons including psychiatrists, psychologists and experienced professional social workers to determine to what extent the procedures of the State Department of Public Welfare in connection with the adoption of minors may be correct or may need revision; whether independent adoptions, of which there have been many since our current adoption law was enacted in 1943, have been successful or otherwise; whether independent adoptions have proved to be unsuccessful, and if so, in what respects, etc. You point out that we have now had ten years experience with our present adoption law and many of the children adopted during that period, then mostly infants, are now of sufficient age to enable the research workers to determine the answers to the many questions that need to be known.

Answering your first question §409.02 of the F.S., authorizes your department to receive and accept aid to be used for carrying out the purposes of the State Welfare Program. The proposed study is well within the scope of your services.

The grant of money could be handled in either of two ways.

1. The grant could be made on the condition that the money be deposited in a private bank adequately secured, and subject to disbursement by your director and some other officer or employee of your Board. It would be subject to annual audit by the State Auditor.
2. It could be deposited in the State Treasury with the condition that it should remain funds of the donor or granter until disbursed and the further condition that any unexpended portion should be refunded to the donor. In either event, whether the funds are deposited in a private bank or the State Treasury deductions from salaries of the special employees would be required under §121.02, F.S., for contribution to the State Employee Retirement Fund. This presents no actual difficulty, because under §121.08 of the State Retirement Act, all contributions to the retirement fund, without interest, may be withdrawn by any employee leaving the service of the state, who has not made contributions for as much as ten years.

Any salary in excess of \$10,000 would require approval of at

least five members of the State Budget Commission under §216.171-(3) of the Statutes.

Your fourth question refers to §72.27 of the Statutes which requires that the adoption records be confidential. The research staff employed to make the survey would be attached to the Department of Public Welfare and during the term of their service they would be employees of that department. They would need to have access to the adoption records and to have contact with the adopting families selected to participate in the studies. The study would not disclose any names of adopted children or adopting parents and participation in the study would be entirely voluntary.

Access by the research staff to the adoption records of your department would present no legal difficulty because their work would be work of your department and in furtherance of your welfare program, and as much a part of it as any work your department might do in connection with the adoption cases.

July 17, 1953.—053-152.

**PUBLIC AID—FILING LISTS OF RECIPIENTS—
MANNER OF LISTING—§409.38, F.S. APPLICABLE**

QUESTION: Does Ch. 27993, Laws of 1953, §409.38 F.S., require that the lists of public assistance recipients filed with the clerk of the circuit court by the District Welfare Boards be recorded by the clerk and, if so, who pays for the recording?

To: Department of Public Welfare, P.O. Box 989, Jacksonville, Florida:

The law merely requires that the lists be filed with the clerks as a part of the records of their offices. There is nothing in the Act which requires that the lists be recorded.

July 29, 1953.—053-174.

**FLORIDA CITIZEN—PUBLIC WELFARE SERVICE IN
NONRESIDENT STATE—LEGAL RESIDENCE
NOT AFFECTED**

QUESTION: Would the legal residence of a Florida citizen be affected by his admission to the United States Public Health Service Hospital at Carville, Louisiana, when he had every intention of returning to Florida upon dismissal from the hospital?

To: Department of Public Welfare, Jacksonville, Florida:

The Florida citizen described in your question would remain a legal resident of the State of Florida, under the circumstances set out in your question.

August 6, 1953.—053-187.

DEPARTMENT OF PUBLIC WELFARE—EMPLOYEES—
EDUCATIONAL LEAVE SCHOLARSHIPS—
STATE FUNDS PROHIBITED

QUESTION: May State funds be used for educational leave scholarships for persons in the employ of the Department who agree to return to its employment for a period of time which our Board deems sufficient to justify granting the scholarship, (for example, twice the length of time spent on scholarship study), where the federal government agrees to pay one-half of the cost?

To: *State Department of Public Welfare:*

There appears to be no objection to granting employee leave of absence without compensation for further training but it would not be lawful to spend State funds for such purpose in the absence of statutory authority. There is no statutory authority for such expenditures.

August 3, 1953.—053-181.

PUBLIC WELFARE—ELIGIBILITY—EXCLUSION OF
CERTAIN INCOME—REGULATIONS—
AMENDED §409.37, F.S.A.

QUESTIONS: 1. Are the present rules and regulations of the Department in conformity with, and do they carry out, the policy of Chapter 28143?

2. If the foregoing question is answered in the negative, how can the present rules and regulations be amended so as to conform to both the new state law and the applicable federal laws and regulations?

To: *Department of Public Welfare, Jacksonville, Florida:*

Ch. 28143 amended sub-section 1 of §409.37 of the F.S. The latter was enacted in 1951 and, in effect, authorized the Department of Public Welfare to exclude certain produce of a garden of limited area and certain domestic animals, in the computation of the income of an applicant for State aid when the proceeds of the garden, and the domestic animals were to be used exclusively for the support of the applicant and his family. The amended act puts no limit on the size of the garden or on the number of domestic animals. Your present regulations, following the 1951 statute, does limit the size of the garden and the number of domestic animals. Accordingly, there is lack of conformity with the 1953 statute which places no limit on the size of the garden or in the number of domestic animals.

Your rules and regulations should be changed to conform to the 1953 statute, and the Federal Agency should then be requested to accept the statutory change and revised regulations as they did when the 1951 statute was enacted. Both your agency and the federal agency can, doubtless, make a determination, as was done after the 1951 act, that these exempted items do not, in fact, pro-

duce net income because the cost of production is approximately the value of the products.

July 17, 1953.—053-161.

NURSING HOMES—LICENSES—EXEMPTIONS

QUESTION: Does §400.01 of the statutes, as set out in Ch. 28140 of the Laws of 1953, specifying institutions to be exempted as those that have been in existence twenty-five years apply to the physical institutions or homes in Florida, or does it apply to the length of time that the national organization has been in existence?

To: *Department of Public Welfare, Jacksonville, Florida:*

That part of the Statute to which you refer reads as follows:

"...provided further that this Act shall not be applicable to old age homes owned and maintained by any national fraternal organization, which *has* been in existence for a period of more than twenty-five years."

The quoted provision is ambiguous in that the existence for twenty-five years might refer to the homes or might refer to the national fraternal organization, and either might very well have been in the mind of the Legislature.

However, the use of the singular verb "has", rather than the plural, "have", requires that the words, "existence for a period of more than twenty-five years" be construed to refer to the national fraternal organization and not the homes. I find nothing else in the Chapter which would support a different interpretation.

July 2, 1953.—053-141.

WELFARE—RECIPIENTS OF PUBLIC AID—FILING LISTS— MANNER OF LISTINGS—CH. 27993, LAWS 1953; §409.38, F.S.

STATEMENT AND QUESTIONS: I. The 1951 Session of the Legislature passed House Bill 422. It was vetoed by Governor Warren but the 1953 Session passed the Act over the former Governor's veto. Section 1 of the Act requires every District Welfare Board to file with the Clerk of the Circuit Court, before the 10th of each month, a list of names of all persons in the County who received welfare payments during the previous month and showing the amounts of such payments.

Are the following items "welfare payments" within the meaning of that Act of the Legislature?

- (1) All public assistance recipients?
- (2) The name of the payee in the home of the recipient (example: the mother in an ADC family)?
- (3) The name of the child receiving child welfare services where the payment is made to another (example: payment is made to a boarding home, hospital, transportation company)?

(4) The name of the child receiving general child welfare services where there is no readily definable specific expenditure solely for the child's individual benefit?

(5) The name of the payee necessary to providing child welfare services for the benefit of a child (example: grocery store, transportation company, another welfare agency, boarding home, etc.)

II. Would the source of the funds for payment in any way affect the decision on filing the names of Welfare recipients with the Clerks of the Courts?

To: Department of Public Welfare, Jacksonville, Florida:

To effectively accomplish the objectives of the Act it is necessary that all public assistance recipients, together with the amounts of their allowances, be listed.

Under Paragraph 2 the listing should be "Mary Doe for Jane Doe, dependent child".

In assistance described in Paragraph 3 above, the listing should be "----- Boarding Home, for Jane Doe, child welfare."

Under Paragraph 4, the name of the child and value of services.

Under Paragraph 5, again you could list the "Doe Grocery Store, for Jane Doe, child welfare" and the amount.

Answering your second question, it is my opinion that where any public funds are used, they should be listed. If the source of funds should be Community Chest, County Commissioners, Red Cross, or another similar source, you might add the source in your listing or if the funds might happen to be a private gift of individuals, you might list the name and amount of recipient with the statement "from private funds".

In general, you may choose that form of listing which may be most appropriate, simple and complete.

February 15, 1954.—054-32.

OLD AGE ASSISTANCE—HUSBAND—SUPPORT BY WIFE— RESOURCES OF WIFE—STATE BOARD REGULATIONS

QUESTIONS: 1. Where the Welfare Board finds that a husband has not sufficient income or other resources for his minimum needs, as determined by the Board, and is eligible in all other respects for old age assistance, may the husband be granted old age assistance, notwithstanding the fact that his wife, with whom he is living,

(a) has sufficient income or other resources to provide for both, but refuses to support him;

(b) refuses to disclose to the Welfare Board her income or other resources;

(c) had made a prenuptial agreement with her hus-

band under which neither was to be required to support the other?

2. Is a regulation of the State Department of Public Welfare valid which refuses allowances to a husband whose wife, though able to do so, refuses to support him, or who refuses to disclose her financial ability to the Welfare Board?

To: State Department of Public Welfare, Jacksonville, Florida:

The federal statute on old age assistance, 42 U.S.C.A. 302, subparagraph 7, in prescribing the conditions under which federal aid shall be granted to the states, requires:

"...that the state agency shall, in determining need, take into consideration any other income and resources of an individual claiming old age assistance..." (emphasis added)

The state statute granting old age assistance, §409.16(3), F.S., includes, in the conditions for eligibility, the provision that the applicant

"...has not sufficient *income or other resources* to provide reasonable subsistence compatible with decency or health;..." (emphasis added)

Your agency regulation provides that in considering need of a person applying for old age assistance, the resources and needs of both husband and wife who are living together, or who constitute a family group, shall be taken into consideration, even though only one is applying for public assistance. The regulation further requires the spouse applying for aid to obtain consent of the other spouse to disclosure of the latter's financial capacity.

Under our constitution and statutes, a wife's separate property is her own and, so long as she sees fit to withhold it, her husband has no legal or beneficial interest in it. I will advert to that later. Under the common law, a wife was not required to support her husband. 26 Am. Jur. 940.

The present policy of the Legislature in regard to support of one member of a family by other members seems clear. In Ch. 19315 the legislature of 1939 specifically repealed an 1866 statute which required children of indigent parents to make provision for support of the latter. But even more indicative of the legislative intent is the history of the State Welfare or Social Security Act itself. The original Social Welfare Act, Ch. 17477, was enacted in 1935. That Act, in §17, provided that: "the husband, wife, father, mother, or child, of a recipient of public assistance, or of a person liable to become in need of public assistance, shall, if of sufficient ability, be responsible for the support of such person." The section provided procedure for enforcement.

Chapter 17477 was, in effect, repealed by the enactment of Ch. 18285 at the following legislative session; and Ch. 18285, except as to subsequent amendments, is your present welfare act. The latter omits any reference to support of indigents by wife, father,

mother, or child, and the other matters contained in §17 of the 1935 Act. The omission had the effect of a repeal in that it was a complete revision of a chapter covering a specific matter, aid to the needy. It was omitted from the 1941 revision of the statutes and subsequent revisions. Thus, there is no longer any statute of the state requiring a wife to support her husband, even though amply able to do so.

We come next to the consideration of whether the income and resources of a wife may be considered income or resources of the husband, within the meaning of the Welfare Act?

When a wife who has sufficient funds to support both herself and her husband refuses to support him, whether that be by prenuptial agreement or otherwise, surely it cannot be said that the wife's property or her ability to support her husband is "income" of the husband. That leaves the question, whether a wife's competency in that respect may be considered "resources" or "other resources" of the husband. The meaning of the word "resources" in the federal and in state statutes granting old age assistance has had judicial consideration.

In *Moore vs. State Social Security Commission*, 122 S.W. 2d 391 (Mo.), the court held that the word "resources" in the Federal Social Security Act, and in the state act allowing old age assistance, does not include contributions made by anyone who is not under legal duty to make them, and held that a father was entitled to old age assistance, notwithstanding the fact that his daughter was able and willing to support him. Even more directly in point is the case of *Christensen vs. Department of Social Security*, 131 Pac. 2d 189, (Wash.), where it was held that a wife's property was not a resource within the meaning of the Social Security Act, and that her ability to support the husband did not make the husband ineligible for old age assistance. See also *Price vs. State Social Security Commission*, 121 S.W. 2d 298, (Mo.).

Following the *Moore* case, above, the Legislature of Missouri amended its statute re-defining the word "resources" so that it would include gifts, contributions or support given by other persons. See *Buettner vs. State Social Security Commission*, 144 S.W. 2d 864, (Mo.), and *Howlett vs. Social Security Commission*, 149 S.W. 2d 806 (Mo.), in both of which cases the effect of the amended statute is discussed.

As was pointed out in the *Moore* case, "resources" means money or any other property that can be converted into supplies; means of raising money or supplies; available means or capability of any kind. And that court said that "the law recognizes and enforces rights which are legal, and none other."

Resources as used in the statute means one's money or property which he has the legal right to use or convert to his use, regardless of the will of any other person; it means money or property, or a legally recognizable share or interest therein, which he holds exclusively. The term does not include voluntary gifts, grants, support or other legally unenforcible gratuities.

Section 708.03 of the Statutes provides:

"The property of the wife shall remain in care and management of the husband but he shall not charge for his care and management, nor shall the wife be entitled to sue her husband for the rent, hire, issues, proceeds or profits of her said property."

That statute gives the husband no legal or equitable title to the wife's property. *State vs. Herndon*, 27 So. 2d 833, citing *Gentry-Futch Co. vs. Gentry*, 106 So. 473. Under that section the husband is the agent of the wife in the handling of her property and its income, but she may discontinue that agency and his right to manage her property, and oust him from all connection with it, at will. Until she does exclude him from the handling of her property, the statute is still in effect. Accordingly, where the wife permits the husband to manage her property, and the income therefrom, the circumstances might be such as would permit the income to be considered resources of the husband within the meaning of the Welfare Act. I exclude from this opinion a case of that type until the facts and circumstances are presented. Excluded, also, is any case where the husband can, by any legal process, require from his wife restitution of funds or property held by her which equitably belong to him, or which in equity should be charged with his support.

Our court has not considered it, but courts of several other states have held that where a husband and wife occupy a home owned by the wife she cannot charge him rent for his occupancy, and it is my opinion that an allotment for rent might be refused by your Board under those circumstances.

When the Legislature creates an administrative agency to perform governmental functions, it seldom covers all details. Regulations are authorized for that purpose and their function is to provide the details of method, procedure, etc., necessary to accomplish the purpose of the statute and to carry out its program.

"A regulation, to be valid, must be reasonable, and must be consistent with law." *International Railway Co. v. Davidson*, 257 U. S. 506, 66 Law Ed. 341. Thus a substantive right, power, or privilege, granted by a statute, clear and definite in its scope and meaning, cannot be abridged or enlarged by an administrative regulation, either as to the beneficiaries or the benefits bestowed.

However, I believe that the regulation can be modified to provide that, until conclusively established to the contrary, it will be presumed that, where husband and wife live together, use the same household facilities, and their living expenses are defrayed from common funds such as rents, income derived from sale of crops, poultry, livestock, a going business in which they both participate, such income should be computed as a part of the husband's income. Furthermore, if in law and equity it appears that the income of the wife is in truth and in fact jointly owned by them, it should be computed as a part of the husband's income. The Department must be careful not to create by modification of its regu-

lations avenues over which applicants can proceed to conceal their assets and deny income and property rights belonging to spouses jointly.

In other words, I would suggest retention of the regulation, except that it should be couched on the basis of a presumption that earnings or income of the wife should be computed as earnings of the husband, where they live and cohabit, until conclusively shown otherwise.

May 27, 1953.—053-112.

**PUBLIC WELFARE—AID TO BLIND—ELIGIBILITY—
SALE OF HOMESTEAD**

QUESTION: "If the recipient of blind assistance is the owner of a homestead, as defined by the Florida Constitution, and joined by his wife, conveys to their son, their homestead, reserving unto themselves or the survivor of them, a life estate therein and taking from said son a promissory note secured by mortgage on the homestead for the full purchase price, which shall bear no interest, and payments under which shall not begin until the death of the said homesteader and his wife, will said homesteader forfeit his rights to continuance of his blind assistance?"

To: State Department of Public Welfare, Jacksonville, Florida:

It is my opinion that the transaction would make the recipient ineligible for assistance to the blind if the value of the mortgage should be in excess of the amount of money or securities which are permissible under eligibility. The mortgage, even though it bears no interest prior to the death of the husband and wife has a sales value of approximately its face value discounted by interest computed for a period equal to the life expectancy of the husband or wife, whichever might be the longer.

There may be other reasons why this transaction would make him ineligible, but I think the one just mentioned would be sufficient to require the recipient's removal from the rolls.

PLAYGROUNDS AND RECREATION CENTERS

July 1, 1954.—054-154.

**COUNTY COMMISSIONERS—AUTHORITY TO ACQUIRE
REAL ESTATE FOR PUBLIC BEACH—CH. 418,
F.S.—BROWARD COUNTY**

QUESTION: Can the Board of County Commissioners of Broward County purchase lands for a public beach, subject to an existing mortgage, paying the purchase price therefor in installments over a period of years at times and in sufficient amounts to prevent default in the mortgage indebtedness, but without entering into a binding commitment to pay said installments and without pledging the credit of the county?

To: Honorable John W. Loyd, Attorney, Board of County Commissioners, Ft. Lauderdale, Broward County, Florida:

You have directed our attention to Ch. 25709, Laws of Florida, 1949, which authorizes the Board of County Commissioners of Broward County to acquire lands for a public purpose where it is to the best interest of the county. This act was amended by Ch. 28950, Laws of Florida, 1953. Section 5 of said Ch. 25709 reads as follows:

"This Act is intended to provide additional authority of Broward County, Florida, for the purpose of establishing county playgrounds and recreational centers and is accumulative to any other Statutes authorizing the Board of County Commissioners of Broward County, Florida, to acquire title to the lands in the name of Broward County and for County purposes where title to lands are acquired in the name of Broward County for the use and benefit of the public."

Under Ch. 418, F.S., the governing body of a county may acquire lands or buildings or both for "... playgrounds, recreation centers and other recreational purposes ..." and may equip such recreation centers. Clearly then, a public bathing beach is to be considered as included within the purview of said chapter.

The portion of Ch. 25709 quoted above (§5) does not in my opinion operate to make the special act the exclusive means by which public recreational areas may be acquired and established in Broward County. The language indicates it is intended as additional authority to Broward County for the purposes therein stated.

Accordingly, I see no reason the Board might not proceed under Ch. 418, F.S., if it so desires.

Having established the authority of Broward County to acquire such public beach, it is now necessary to consider the method of financing the purchase thereof.

In *State v. City of Miami*, 150 Fla. 270, 7 So. 2d 146, the court, at page 151 said:

"It has been generally held that contracts for the payment of current county or municipal expenses do not come within the constitutional or statutory prohibition against the incurring of county or municipal indebtedness whether such contracts run for a period of one year or for several years provided the revenue which will be available annually to the county or municipality are found to be sufficient to meet the current expenses including amounts to become due under such contract. See *Leon County v. State*, supra; *Hathaway v. Monroe*, 97 Fla. 28, 119 So. 149; *Tapers v. Pichard*, 124 Fla. 549, 169 So. 39; *Posey v. Wakulla County, Fla.*, 3 So. 2d 799."...

The court was there considering the question presented in light of Art. IX, §6, Florida Consti. However, I believe the same

might be equally applicable under Art. IX, §10 of the Consti. This section, among other things, prohibits any county from loaning its credit to any corporation, association, institution or individual. As contemplated by the question, the conveyance of the property will be made to the county subject to existing mortgage or mortgages. The county will not assume the indebtedness nor will it be obligated to pay any amount. Of course, should default occur in the payment of the mortgage indebtedness, the property is subject to foreclosure proceedings. Nor do I believe that expenditure of county funds for such public purpose is violative of Art. IX, §5, Florida Constitution. See *Lott v. City of Orlando*, 142 Fla. 338, 196 So. 313.

An example of a purchase of property on an installment contract basis by a state agency appears in *Mayo, Commissioner of Agriculture v. Matthews*, 112 Fla. 680, 150 So. 900.

Actually, there have been several instances where a municipality or the state has acquired valuable and needed property by taking title subject to an existing mortgage, but without assuming the indebtedness.

It is, therefore, my opinion that the question should be answered in the affirmative.

CHAPTER XXIX

LABOR

WORKMEN'S COMPENSATION LAW

March 31, 1953.—053-73.

WORKMEN'S COMPENSATION BENEFITS—CREDIT OF
RETIREMENT OR DISABILITY PAYMENTS—
§440.09(4), F.S., APPLICABLE

QUESTION: May a person receive workmen's compensation benefits deriving from state employment and Ch. 440, F.S., and at the same time receive benefits either under the regular retirement provisions or the disability provisions of Chapter 121, F.S.?

To: *Honorable C. M. Gay, State Comptroller:*

Chapter 121 provides the state officers and employees retirement system and is former Ch. 22831, Laws of 1945, as amended.

Chapter 440 sets forth the workmen's compensation law of this state. Subsection 440.09(4) thereof provides as follows:

"If any policeman or fireman or other persons entitled to a pension claims compensation under this chapter there shall be deducted from such compensation any sum which such policeman or fireman or other person may be entitled to receive from any pension or other benefit fund to which the state or municipal body may contribute."

It is recognized that since the adoption of §440.09 (originally §9, Ch. 17481, Laws of 1935, as amended by §3, Ch. 18413, Laws of 1937) most of our laws providing retirement systems for various state and county officers and employees, including Ch. 121, have been enacted. It is to be noted that the words "policeman or fireman or other persons entitled to a pension", as such words are used in §440.09(4), refer to no particular retirement or pension systems, but the reference is general; and it is recognized that a pension or retirement system for public officers or employees must derive from law authorizing the same. There is the rule that when, in a statute, reference generally is made to other laws existing at the time of the enactment of the statute, but also subsequent amendments thereof. *Hecht v. Shaw (Fla.) 115 So. 333; Sutherland Statutory Construction, 3rd Ed. Vol. II, page 550, Section 5208.* Such legal principle reasonably leads to the conclusion that the retirement system as set forth in Chapter 121 is a "pension" system, within the meaning of the quoted portion of §440.09(4).

In view of the foregoing, in my opinion the above question is answered as follows:

Such a person as contemplated by the question may not re-

ceive full workmen's compensation payments and also benefits under the disability provisions of Ch. 121. Amounts otherwise payable to such a person during any stated period under the workmen's compensation law shall have credited thereon the amounts payable to him during such period under the provisions of Ch. 121. Hence, it follows that if the amounts otherwise payable to such person under Ch. 121 exceed amounts payable under the workmen's compensation law for any given period, then such person is entitled to receive no workmen's compensation payments.

August 9, 1954.—054-192.

WORKMEN'S COMPENSATION COVERAGE—DREDGING OPERATORS—EMPLOYEES ELIGIBLE

QUESTION: A dredging company is operating dredges in canals leading from navigable waterways into private property. The dredging is being done for the owners of property bordering the canals and navigable waters, and the purpose of the dredging is to provide these private owners with boat slips and access to navigable waters. While the primary purpose is to provide water access to the navigable waters, as an incident to this operation, there is a building up of the property in question by reason of the discharge from the dredging, and at least some of the employees are employed a part of the time in the handling of this dredging discharge on private property. Are the employees of this inter-coastal dredging company covered under the terms of Florida's Workmen's Compensation Act?

To: Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:

It is assumed from the above statement that these slips are being dredged for use of boats owned and operated for private purposes; and this opinion is conditioned on such assumption.

Our Court held in *Hunt vs. Basil E. Kenny Lumber Co., Fla., 194 So. 366*, that where a person was engaged in maritime employment, such employment did not fall within our Workmen's Compensation Law. A contract, both maritime and non-maritime in character, is ordinarily indivisible; and if the non-maritime feature is incidental it will not defeat admiralty jurisdiction. *United Fruit Co. vs. U. S. Shipping Bd. Merchant Fleet Corp., 42 F. 2d 222*. In *Pillsbury Flour Mills Co. vs. Interlake S.S. Co., (C.C.A. N.Y.) 40 F. 2d 439, certiorari denied, 282 U.S. 845, 75 L. Ed. 750*, it was held that the rule that a contract to be maritime and within the admiralty jurisdiction must be "wholly maritime" means that the principal subject matter of the agreement gives its character to the whole. Hence, the question here is whether the dredging operation is primarily a maritime one; and that involves "vessels", "navigable waters", and what constitutes maritime operations.

Dredges have on occasions (in cases not involving workmen's compensation laws) been held "vessels" under admiralty law. *Warren & Arthur Smadbeck, Inc., vs. Helling Contracting Corp. (C.C.A. N.Y.) 50 F. 2d 99, certiorari denied, 284 U.S. 651, 76 L. Ed. 553*;

The Alligator (N.J.) 161 F. 87. And it has been held not essential that a "vessel" have aboard the means by which it may be propelled. *Charles Barnes vs. One Dredge Boat* (D.C. Ky.) 169 F. 895; *The Robert W. Parsons*, 191 U.S. 17, 48 L. Ed. 73.

Navigable waters, within the concept of admiralty law, include among others, canals, and slips if used for maritime activities. *The Lucky Lindy* (C.C.A. La.) 76 F. 2d 561; *La Casse vs. Great Lakes Engineering Works, Mich.*, 219 N.W. 730.

In *Woods vs. Merrill-Stevens Dry Dock & Repair Co.* (D.C. Fla.), 14 Fed. Supp. 280, it appears that the defendant, in connection with its business, operated a dredge, not self-propelled, for the purpose of clearing silt and debris from its repair slips. The plaintiff in the case sought to recover under the Seaman's Act (46 U.S.C.A., Sections 688, 713) in connection with death of her husband in the course of his employment on said dredge. The court held there was no admiralty jurisdiction, but that the cause of action was within the provisions of Florida Workmen's Compensation Law. In arriving at that conclusion, the court cited *Sultan Ry. & Timber Co. vs. Dept. of Labor*, 277 U.S. 135, and quoted from that case: "Where the employment, though maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liability of the parties, as between themselves, may be regulated by local rules ..." Other cases mentioned by the court are discussed.

In *United States Dredging Co. vs. Lindberg*, 18 F. 2d 453, certiorari denied, 274 U. S. 759, 71 L. Ed. 1337, and in *Orleans Dredging Co. vs. Frazee*, Miss., 161 So. 699, certiorari denied, 56 S. Ct. 383, it was held that the business of dredging canals connecting navigable waters was not such a maritime operation as to preclude application of state workmen's compensation laws, even though the canals when finished would constitute navigable waters. See also *Fuentes vs. Gulf Coast Dredging Co.* (C.C.A.) 54 F. 2d 69; *Hargis vs. McWilliams Co. La.*, 119 So. 88; and *Southern Surety Co. vs. Crawford, Tex.*, 274 S.W. 280. In several of these cases the point was made that the dredge involved was not self-propelled; however, as indicated above, we do not consider this material.

If the operation here is primarily a maritime one, our Workmen's Compensation Law is not applicable to employees engaged in such work. It is recognized that the question is a controversial one which could be settled with finality only by a court in a proper proceeding. However, in the absence of such a court adjudication, on the basis of the foregoing authorities, reasonably it seems that the better position is that the operation here involved, though maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, hence that the employees of this dredging concern are employees within the meaning of our Workmen's Compensation Law. Therefore, the question is answered in the affirmative.

January 5, 1953.—053-4.

WORKMEN'S COMPENSATION COVERAGE—ELECTED
OFFICIALS—WAIVER OF EXEMPTION

QUESTIONS: 1. Are constitutional officers of the State of Florida who are elected at the polls employees within the meaning of that term as used in the Florida Workmen's Compensation Act?

2. May the State of Florida as the employer waive the exemption or exclusion of officers elected at the polls in order to secure Workmen's Compensation coverage for such constitutional officers?

3. If the answer to question two be in the affirmative, then who is authorized to waive the exemption or exclusion by and on behalf of the State of Florida for the following officers:

(a) Secretary of State, (b) Superintendent of Public Instruction, (c) Sheriffs and other elected County Officers?

To: *Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:*

Relevant provisions of the Workmen's Compensation Act are mentioned and quoted:

Section 440.02(1), F.S. defines "employment" as used in the Act as follows:

"The term 'employment' includes employment by the State and all political subdivisions thereof * * * in which three or more employees are employed in the same business or establishment *except officers elected at the polls* * * *." (Underscoring supplied)

Section 440.02(2), F.S. defines "employee" as follows:

"The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written * * *." Section 440.04(2), F.S. provides:

"Every employer having in his employment any employee not included in the definition 'employee' or excluded or exempted from the operation of this chapter may at any time waive such exclusion or exemption and accept the provisions of this chapter by giving notice thereof as provided in Section 440.05, and by so doing be as fully protected and covered by the provisions of this chapter as if such exclusion or exemption had not been contained herein."

Section 440.38(5), F.S. provides:

"The state, its boards, bureaus, departments and agencies and all its political subdivisions who employ labor shall be deemed self-insurers under the terms of this chapter unless they elect to procure and maintain insurance to secure the benefits of this chapter to their

employees and they are hereby authorized to pay the premiums for the said insurance."

It is to be noted that officers elected at the polls are specifically excluded from the provisions of the Act by above §440.02-(1), and that the only conceivable way such officers could obtain the benefits of the Act would be on the assumption that they are employees of the State of Florida and that there could be exercised the power of the employer to bring them under the Act as contemplated by §440.04(2). The theory that constitutional officers of the State of Florida under any circumstances are employees within the meaning of the act is not tenable.

The term "public office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an "employment" does not comprehend a delegation of any part of the sovereign authority. E.g., *State v. Sheats*, 78 Fla. 583, 83 So. 508; *State v. Jones*, 79 Fla. 56, 84 So. 84; *State ex rel. Arthur Kudner, Inc. v. Lee*, 150 Fla. 35, 7 So. 2d 110. In the light of the above statement and the authorities supporting it, it is to be observed that the powers and duties of a public officer are not those to be exercised by an employee; that while a person occupying such an office may be subject to appropriate disciplinary action for malfeasance, misfeasance or nonfeasance, the characteristics of the office are constant regardless of the occupancy; and the person occupying such an office (state or county), to the extent that he is charged with the exercise of certain public duties, is the state.

In view of the foregoing, the above questions are answered as follows:

(1) Constitutional officers of the State of Florida elected at the polls are not employees within the meaning of that term as used in the Workmen's Compensation Act.

(2) Since the State of Florida is not the "employer" of such a constitutional officer, as such term is used in the Workmen's Compensation Act, there is no provision for the state through any of its officers (state or county) to waive the exclusion of other officers elected at the polls, as contemplated by Section 440.04(2).

(3) Since the answer to question two is in the negative, no answer is required to this question.

April 13, 1953.—053-79.

STATE TUBERCULOSIS BOARD EMPLOYEES—WAIVER OF
CERTAIN BENEFITS UNDER WORKMEN'S
COMPENSATION CH. 440, F.S.

QUESTION: May certain employees of the State Tuberculosis Board enter into an agreement with said Board waiving possible compensation for a described disability compensable under the workmen's compensation law, as described in detail below?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

The State Tuberculosis Board has in the past employed numerous ex-tubercular patients. Many of these have proved to be valuable employees of the Board, and the Board desires to continue the policy of employing certain of them. Experience has demonstrated that there has been such a recurrence of tuberculosis among such employees as to bring about the following results: (1) Cancellation by insurers heretofore furnishing workmen's compensation coverage, because of their determination that loss ratio due to the incidence of tuberculosis among such employees is too great to justify the risk. (2) As a result of the cancellation of such coverage, the Board is placed in the rather precarious position of a self-insurer in relation to these employees and their rights to workmen's compensation benefits. If the Board is permitted, it desires to enter into an agreement with each of such described employees to the effect that if such an employee suffers a recurrence of said disease during the course of his employment with the Board, the employee will waive benefits otherwise payable under the workmen's compensation law in consequence of such disability, he to be covered for any other injuries, etc., under said law in relation to such employment.

The Board is a public corporation and, as such, is a state agency. *Kennard v. State Tuberculosis Board, (Fla.) 176 So. 872*. Heretofore this office held that the state, its boards, bureaus, agencies, etc., may not, in pursuance of §440.05, F.S., elect not to accept the provisions of the workmen's compensation law. *Opinion 050-511, 1949-50 Biennial Report, 441*. Notice is taken of subsection 440.21(2), F.S., providing that, "No agreement by an employee to waive his right to compensation under this chapter shall be valid, unless he has rejected the chapter as provided in §440.05". Whether a state employee may, in pursuance of the provisions of §440.05, F.S., elect not to accept the provisions of the workmen's compensation law, is a matter not necessary to be here answered, in the light of the above-stated question.

From the above, it is quite obvious that one of the described employees of said board may not enter into an agreement with the Board to the effect that if the employee suffers a recurrence of tuberculosis during the course of his employment with the Board, he will waive benefits otherwise payable under the workmen's compensation law in relation to said disability.

It is remarked that the policy of the Board in times past of employing former tubercular patients and the desire of the Board to continue such policy, is a most meritorious one. However, it is recognized that the recurrence of tuberculosis among such employees has raised a most serious problem. The circumstances of employment here found are so unique that it is felt that proper legislation might be enacted to fairly and equitably cope with the situation.

July 9, 1954.—054-157.

CLERKS CIRCUIT COURT—FILING FEE—APPLICATION
FOR RULE NISI UNDER §440.24(1), F.S.

QUESTION: Under §440.24(1), F.S., where application for a rule nisi to enforce an order of the Commission is filed in the Circuit Court, is the clerk of such Court entitled to the filing fee provided by §28.241(1), F.S.?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

Said §440.24(1), F.S., provides a procedure for the enforcement of payment of compensation due under a compensation order of the Commission, where there has been non-compliance therewith for a period of ten days after the same becomes final. The Commission or the beneficiary of the order may make application to the appropriate Circuit Court for the issuance of a rule nisi "... directing such employer or carrier to show cause why a writ of execution, or such other process as may be necessary to enforce the terms of the order, shall not be issued..." The statute is silent as to the payment of court costs.

Section 28.241(1), F.S., relating to fees of the Clerk of the Circuit Court in part provides:

"Upon the institution of any civil action, suit or proceeding in the circuit court or any county in the State of Florida there shall be paid by the party or parties so instituting such action, suit or proceeding, as fees of the clerk of said court, for all services to be performed by him therein, in lieu of all other fees heretofore charged, except as hereinafter provided, the sum of seven dollars and fifty cents." (Emphasis supplied).

We considered an analogous situation in Opinion 053-334, copy of which is enclosed. Chapter 27996, Laws of Florida, 1953 (Uniform Support of Dependents Law) does not provide for payment of costs in any proceeding filed thereunder. The opinion held that the parties or party instituting the action should pay the filing fee provided by §28.241(1), F.S., subject of course, to final order of the court as to the assessment of costs in the case.

Here, the enforcement of the order of the Commission is essentially a civil proceeding. The clerk in "... any civil action, suit or proceeding of the circuit court...", is to be paid the filing fee of \$7.50. He then is entitled to that fee.

It follows that the question is answered in the affirmative.

UNEMPLOYMENT COMPENSATION LAW

April 27, 1954.—054-102.

FLORIDA INDUSTRIAL COMMISSION—REAL AND
PERSONAL PROPERTY—BIDS—SHERIFF'S
SALE UNDER WARRANT

QUESTIONS: 1. May the Commission lawfully bid upon (a) personal property, or (b) real property, at a sale conducted by a sheriff after levy upon said property under an unemployment compensation tax warrant issued by the Commission?

2. Assuming that the right to bid carries with it the right to buy, if question (1) is answered in the affirmative, what would be the manner of taking title to real estate when the Commission is the high bidder?

3. What would be the procedure for converting such real estate into cash for application against unpaid unemployment compensation delinquencies?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

The method for collecting delinquent contributions, required to be paid by relevant provisions of Ch. 443, F.S., are set forth in §443.15, F.S. We are here concerned with the procedure prescribed in §443.15(3). Under stated circumstances, liens are perfected for such delinquent contributions, as to which it is set forth:

"Upon presentation of said notice of lien the clerk of the circuit court shall record same in a book maintained by him for that purpose, and, thereafter the amount of said notice of lien, together with the cost of recording and interest accruing upon the contribution amount, shall become a lien upon the title to and interest, whether legal or equitable, in any real property, chattels real or personal property of such employer against whom such notice of lien is issued, in the same manner as a judgment of the circuit court duly docketed in the office of such circuit court clerk with execution duly issued thereon and in the hands of the sheriff for levy;..."

Thereafter, the Commission may issue a warrant, under and in pursuance of such notice of lien, directed to all and singular the sheriffs of the State of Florida, and in relation thereto, among other things, it is provided:

"The sheriff shall proceed upon said warrant in all respects with like effect and in the same manner prescribed by law in respect to executions issued out of the office of the clerk of the circuit court upon judgments of the circuit court and the sheriff shall be entitled to the same fees for his services in executing the warrant as under a writ of execution out of the circuit court, to be collected in the same manner."

The subsection here involved has been before our Supreme Court one time. In the case of *Florida Industrial Commission vs. Coleman, Fla.*, 18 So. 2d 905, the Court held that where a sheriff, in pursuance of a warrant contemplated by §443.15(3)(a)2, had levied upon an employer's personal property, and such employer claimed exemption from levy to the extent provided by Art. X, §1, Fla. Const., the claim should be granted. In disposing of the case the Court referred to the part of the statute concerning the duty of the sheriff, quoted above, and remarked:

"The force and effect of the lien being so limited by the statute, it follows that the claimant had the same right to claim exemption under the Constitution as he would have had as against a levy under execution issued pursuant to an ordinary judgment in any civil action."

This wording of the statute and the reasoning of the Court relative to enforcement procedures should not result in confusion. The fact remains that the contribution required is an excise tax; and general rules relating to construction of statutes providing tax collection procedures are here applicable.

It is recognized that taxes can be lawfully levied, assessed, and collected only in the express method fixed by statute. *State vs. Gay, Fla.*, 35 So. 2d 403, 409; 51 Am. Jur. Sec. 651, page 617.

The question of whether the Commission may bid in property at a sheriff's sale under warrant, as contemplated by §443.15(3)-(a)2, requires an examination of the powers of the Commission as set forth in Ch. 443.

There is no specific power provided in said chapter authorizing the Commission to bid on property at such a sale.

There is the matter of funds and appropriations. Three distinct funds are specified in Chapter 443: Unemployment Compensation fund (§443.10); Employment Security Administration Fund (§443.15); and Special Employment Security Administration Fund (§443.14). Section 11 of Ch. 28115, Laws of Florida, 1953 (general appropriations act) provides, in effect, that federal money appropriated by the Congress to be used for state purposes is "re-appropriated as far as it may be necessary to the purpose for which same was made available and insofar as the same is permitted by the Federal statutes." This office does not assume to construe or ascertain the effect of federal statutes and regulations promulgated in pursuance thereof; hence, we deal only with the state statutes mentioned. There appears to be no specific provision in the mentioned state statutes authorizing the Commission to use any of its funds to apply on a bid for property at a sale contemplated by the question.

Further, if it had been the legislative intent that the Commission could bid in property at such a sale, provision reasonably would have been made with respect to the procedure to be followed concerning the Commission's acquisition of title to any such property and conditions and circumstances controlling the sale thereof by the Commission.

In view of the foregoing, in my opinion the questions are answered as follows:

(1) There appears to be no authority in the several provisions of Ch. 443, F.S., or any other Florida laws, authorizing Florida Industrial Commission to bid on real or personal property at a sheriff's sale under warrant, as contemplated by §443.15(3)(a)2, F.S.

Whether funds of the Commission deriving from and held by it in pursuance of the provisions of Ch. 443, F.S., may be used by the Commission to bid in property at such a sale, under any federal law or regulations in pursuance thereof, is a question which may be answered for the Commission by inquiry addressed to the proper federal authorities.

(2) and (3) In view of the answer to the first question, no further comment is required relative to the second and third.

October 30, 1953.—053-297.

EMPLOYMENT SECURITY ADMINISTRATION—RENTAL-
LEASE COMMITMENT—REDUCTION IN FEDERAL
APPROPRIATION

QUESTION: Where Florida Industrial Commission, on November 19, 1952, entered into a ten-year lease with owners of property on which was located a building to be used for an Employment Service office, what is the extent of the liability of the Commission for the payment of the rental specified in said lease for the balance of its term, in view of the fact that by reason of the reduction in federal funds for rental and personnel requirements for employment service offices in Florida, the Commission has been forced to close said office and has ceased to occupy said premises, and that no further occupancy or use thereof can or will be made by the Commission?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

It is sufficient here to state that the mentioned lease was entered into between the owner of the property involved and Florida Industrial Commission on November 19, 1952; that said property is located in Miami, Florida; that the term of the lease was for ten years beginning December 1, 1952; and that the lease required the Commission to pay monthly rental of \$750 in advance on the first day of each month during the term of said lease.

At the outset it is recognized that perhaps the lessors of this property had reason to believe that the lease was enforceable during its entire term. In view of the conclusion set forth below, and the circumstances here found, a detailed explanation is proper. The question would seem to revolve around the subject matter of a lease of this nature in relation to lawful authority for the execution of it and the appropriation of public monies during the term of the lease to pay the required rental.

In former opinion of this office 051-184, copy of which is attached, there were dealt with matters relevant here: the authority and duty of the Commission under mentioned federal and state laws to maintain in Florida employment offices in such number as required for the proper administration of such laws; the fact that the only source of monies available to the Commission to pay the rental for such employment service offices derives from the federal government in pursuance of federal law and monies made available from time to time by the federal government; and the fact that such monies are trust funds when received by the Commission to be used only for the purposes mentioned.

We are informed that prior to the fiscal year beginning July 1, 1953, the Commission, as required, submitted to the proper federal authorities its proposed budget for such fiscal year, setting forth the estimated funds needed for various authorized purposes in connection with employment service. Subsequently thereto, and prior to any final action by the federal authorities with respect to such budget, the Congress of the United States materially reduced total federal funds heretofore provided for such service in the several states. The result was that the budget as finally approved in total amount was considerably less than the amount requested. It is observed that included in the budget submitted was an item for the employment service office here involved. The Commission had official notice of such reduction on or about August 15, 1953.

Confronted with such reduction in total amounts available for rental and personnel, the Commission was required to close certain of its employment offices. It is relevant here to quote the following from letter of the General Counsel for the Commission to the lessor, dated August 24, 1953:

"The writer has been directed by the Chairman of the Industrial Commission to advise you that because of the failure of Congress to appropriate sufficient funds for the continued maintenance and operation of employment offices throughout the country on the same scale and to the same extent as has been done in past years, Florida has received substantially less money for the maintenance and operation of employment offices incident and necessary to the administration of the Florida Unemployment Compensation Law in this state. Specifically, it will be necessary to close at least seven local employment offices in Florida. In Miami, it has been determined that it will be necessary to close the employment office located in your property..."

* * * *

"We believe that we shall be able to pay the rent at this office through the month of September and possibly October, but we will vacate this office not later than September 15."

We are informed that the federal authorities may suggest, but do not require, which offices should be maintained and which closed. The duty devolves upon the Commission to so allocate

federal funds available for rental and personnel requirements of its employment offices as to assure uniform application of the service contemplated by such laws throughout the state. It is here assumed that the Commission in its determination to close certain of its employment offices, including this office, did so as result of necessity in its administration of the mentioned laws.

The request for opinion and copies of correspondence attached thereto indicate that the Commission closed this employment office and vacated the premises on September 15, 1953; that a representative or representatives of the Commission have attempted to deliver keys to the premises to the lessor, but that the latter has refused to accept them; that the rental provided in the lease was paid by the Commission to and including the month of October, 1953; and that attorneys for the lessor maintain that the Commission is liable for the full term of the lease.

Further disclosures in these mentioned letters evidence facts which contribute to the unhappiness of the situation. It appears that the lessor was required to make outlay of substantial sums for a real estate brokerage fee and for improvements in the premises in connection with this lease. However, harsh as it may seem, the responsibility of the present Commission in administering the involved laws is not to be gauged or coerced by the acts of those who previously constituted the Commission. No necessity existed in said previous opinion 051-184, in connection with the question dealt with therein, to declare that any lease, as referred to in said opinion and as here considered, is at all times subject to termination as result of failure of Congress to appropriate sufficient funds to meet the lease requirements. The situation is analogous to that which would exist were these strictly state funds: except where the state constitution provides otherwise, the power to appropriate state money is secured to the Legislature (*State vs. Lee, Fla.*, 163 So. 859); and no state officer or board by any action could control, impair or coerce that power.

In view of the foregoing, in my opinion the question is answered as follows:

Unfortunately from the standpoint of the lessor, the performance of this lease on the part of Florida Industrial Commission depended entirely upon availability of federal funds and the duty of the Commission to so maintain employment offices to assure uniformity of administration of the mentioned laws throughout the state. Assuming that the action of the Commission in closing this and other employment offices was measured by these factors, the legal authority of the Commission to pay such lease rental, and its liability therefor, ceased on September 15, 1953, when it terminated the employment office theretofore maintained on the leased premises.

PRIVATE EMPLOYMENT AGENCIES

July 8, 1953.—053-143.

SEE OPINION NO. 051-213 FLORIDA INDUSTRIAL COMMISSION—LICENSES— REVOCATION AND REGULATION—DISABLED VETERANS' EXEMPTION

QUESTION: Is the license fee provided for in Ch. 449, F.S., such a regulatory fee as to nullify or preclude the disabled veterans' exemption provided for by §205.16, F.S.

To: *Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:*

Attorney General's Opinion No. 051-213 discussed in detail the distinction between license fees imposed for regulatory or enforcement purposes and those imposed as revenue producing measures. In this opinion the conclusion was reached that license fees imposed for regulatory purposes do not come within the exemption provided by §205.16, F.S.

In my opinion, Ch. 449, F.S., is primarily a regulatory law designed to protect the public from unscrupulous private employment agencies. Broad powers and duties are delegated by law under this chapter to the Florida Industrial Commission to regulate private employment agencies and strict requirements provided for persons or corporations seeking to be licensed under its provisions. Such licenses may be denied or revoked by the Commission at any time the licensee does not comply with the law or rules and regulations adopted by the Commission for its enforcement.

Your question is therefore answered in the affirmative.

CHAPTER XXX

PROFESSIONS AND VOCATIONS

FLORIDA BASIC SCIENCE LAW

August 6, 1953.—053-191.

BASIC SCIENCES—APPLICANTS FOR EXAMINATION— ELIGIBILITY—BOARD OF EXAMINERS—AUTHORITY

QUESTION: Is it within the authority of the Board of Examiners in the Basic Sciences to deny an individual the right to take future examinations given by said board when the applicant meets all requirements for the examination, but is guilty of cheating on a previous examination?

To: Honorable M. W. Emmel, Secretary, Board of Examiners in the Basic Sciences, Gainesville, Florida:

Section 456.10, F.S., provides the qualifications of an applicant for certificate of proficiency in basic sciences and reads as follows:

"No person shall be eligible for examination for a certificate of proficiency in the basic sciences until he shall have furnished satisfactory evidence to the board that he is a citizen of the United States of America, *is of good moral character* and is a graduate of an accredited high school, or possesses the educational qualifications equivalent to those required for graduation by all accredited high schools, such educational qualifications to be determined by the board." (Emphasis supplied.)

This question is one which the Board can in its sound discretion determine from a consideration of all the circumstances. It is the duty of the individual seeking to take future examinations to furnish satisfactory evidence to the Board that he is of good moral character. In this instance the Board knows he has been guilty of cheating in a previous examination, and knowing this fact it must take it into consideration as being a factor weighing against his having a good moral character, nevertheless, it may be that the Board will determine that this one act alone when considered with other evidence of good character, perhaps an honest and sincere repentance, or other indications of subsequent rectitude is not enough to justify the irrevocable conclusion that under no consideration will he ever be of good moral character at any future time so as to permit him to take the examination. On the other hand the Board may conclude that the fact of cheating weighs too heavily against his being possessed of good moral character and deny him the privilege of taking another examination. Therefore, in the final analysis the situation is one which the Board can exercise a reasonable discretion to determine the question of good moral character.

PHYSICIANS

May 22, 1953.—053-108.

NONRESIDENT PHYSICIAN—PRACTICE OF MEDICINE—
DEFINITION—LICENSES—§458.13(1), F.S.

QUESTION: Is a physician who resides outside the state practicing medicine, as defined in §458.13 of our Medical Practice Act, when he receives diagnostic forms from residents of Florida and thereafter ships the medication to those people inside the state to treat themselves?

To: Dr. Homer L. Pearson, M.D., Secretary-Treasurer, State Board of Medical Examiners, Miami, Florida:

Section 458.13, F.S., 1951, defines what constitutes the practice of medicine within the State of Florida. Section 458.13(1) provides as follows:

“458.13 Definition of practice of medicine; limitations, exceptions, etc.

“(1) Any person, except as hereinafter provided, shall be deemed to be practicing medicine within the purview of this chapter, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.”

A physician who resides in Florida and who receives diagnostic forms from residents from other sections of the state and then ships medicine to them to treat themselves would be practicing medicine within the purview of §458.13 and would be required to be licensed by the Board of Medical Examiners.

It has been held that visits of a licensed physician of one state who makes periodic visits to a town in a neighboring state to examine patients and thereafter sends medical advice and medicine to them from his residing state would be *practicing medicine in the town where he made the periodic visits and be required to be licensed as a physician under a town ordinance*. See *Slocum v. Fedonia*, 134 Kansas 853; 8 Pacific 2d 332. In this case the physician was actually present periodically in the town in a state other than the one he was residing in, and, therefore, jurisdiction was had over him.

The jurisdiction of the State of Florida extends only over persons and property actually located within the territorial limits of the state. Although the physician who resides out of the state, and who ships medicine into the state would be practicing medicine within the contemplation of our Medical Practice Act, the State of Florida would have no jurisdiction to require him to be licensed to practice medicine in this state in the absence of his residing or being present within the state. It is realized that such a phy-

sician could cause irreparable injury to the residents of this state if he was not a properly qualified physician. It is felt that each shipment of medicine from outside of the state to residents inside the state from diagnostic forms received from the state should be regulated by the appropriate federal agency under applicable federal statutes or regulations.

OSTEOPATHS

August 13, 1953.—053-199.

OSTEOPATHIC MEDICAL EXAMINERS—BOARD MEMBERS—COMPENSATION—CH. 28162, ACTS 1953

QUESTION: Should the members of the Board of Osteopathic Medical Examiners be paid compensation under Ch. 28162 or Ch. 28215, both acts of 1953?

To: *Dr. Richard S. Berry, Chairman, State Board of Osteopathic Medical Examiners, St. Petersburg, Florida:*

I have compared these acts, which became law the same day, June 15, 1953, and I find that there is definitely a conflict.

Chapter 28162, §7 provides, among other things that each member or officer of the board shall be reimbursed for his transportation expenses for traveling when necessary from the place of his professional office to such place as he is required to go in pursuance of his duties as a board member herein, and for returning therefrom, and in addition thereto, each member shall be entitled to recompense of twenty-five dollars (\$25.00) a day for each day spent so traveling and attending necessary board meetings in this connection. The act provides that sufficient funds shall be appropriated in the Biennial Appropriations Act.

Chapter 28215, §7, Acts of 1953, provides, among other things, that members of the board shall receive ten dollars (\$10.00) per day, or any part of a day, while attending official board meetings, not to exceed twelve meetings per year, and shall receive per diem and mileage as provided in §112.061, F.S., from place of residence to place of meeting and return.

Inasmuch as Ch. 28162, Acts of 1953, deals only with the regulation of osteopaths and the Board of Osteopathic Medical Examiners, it is my opinion that the Legislature intended for that act to control rather than §7 of Ch. 28215, which is a chapter dealing with many regulatory boards.

Chapter 28162 controls compensation of the board members rather than the General Appropriations Act because of the provisions of §4(5)g, Ch. 28231, Acts of 1953, which provides that acts of the Legislature fixing the salary for specified officers or employees shall supersede the General Appropriations Act of the same session in such respect.

Before obligating your appropriation for per diem under Ch.

28162, you should consult the State Budget Director and rework your budget so as to integrate Ch. 28162 with provisions of the General Appropriations Act so they will harmonize.

CHIROPODY

July 27, 1953.—053-173.

PRACTICE OF CHIROPODY—INJUNCTION—"FOOT AND ARCH SPECIALIST"—VIOLATIONS

QUESTION: In the light of the injunction granted in the case of State Board of Chiropractic Examiners vs. Charles K. Sheban, is a person practicing chiropractic in violation of Ch. 461, F.S., when he holds himself out as a "Foot and Arch Specialist"?

To: *Dr. Joy E. Adams, Secretary-Treasurer, Florida State Board of Chiropractic Examiners, St. Petersburg, Florida:*

Chapter 461, F.S., makes it unlawful for any person to profess to be a chiropractor or to practice or assume the duties incident to chiropractic without first obtaining from the State Board of Chiropractic Examiners a chiropractic license. Chiropractic is defined as the diagnosis, medical, surgical, palliative or mechanical treatment of ailments of the foot or leg, except the amputation thereof, and includes the use and prescription of local anesthetics.

You did not advise me as to just what services are offered or performed by the person holding himself out as a "Foot and Arch Specialist". Therefore, I will answer you by advising that if such person performs any of the services set forth in the law as constituting chiropractic that said person is in violation of Ch. 461, F.S., unless he has been duly licensed as provided by said chapter. However, such person is not in violation of Ch. 461, F.S. if his services consist only of fitting, recommending, demonstrating, advertising, adjusting or the sale of corrective shoes, arch supports or similar appliances or foot remedies.

NATUROPATHY

April 20, 1954.—054-96.

NATUROPATHIC PHYSICIANS—PRACTICE—NARCOTIC DRUGS

QUESTION: Do naturopaths properly licensed under the laws of the State of Florida have the right to prescribe, dispense or administer narcotic drugs in the course of their practice?

To: *Dr. Julio Gavilla, Secretary-Treasurer, Florida State Board of Naturopathic Examiners, Tampa, Florida:*

The case of *In re Complaint of Melser*, 160 Fla. 333, 32 So. 2d 742, involved the statutory right of naturopathic physicians to prescribe narcotic drugs. The Circuit Court of Pinellas County decided that naturopathic physicians had the right to prescribe narcotic drugs which was affirmed by the case cited above.

The right of naturopathic physicians to prescribe drugs and administer narcotic drugs was again attacked and upon appeal to the Supreme Court it was held by the majority opinion in the case of *State Department of Public Welfare v. Melser*, 69 So. 2d 347 (Fla.) on rehearing, that the Court would not recede from its approval of this right contained in the prior case, stating at page 353 as follows:

"...the affirmance of that judgment (referring to *In re Complaint of Melser*, supra) by this court—even without opinion—*settled the law to that extent...*" (Emphasis supplied)

In view of the two cases cited above, it is my opinion that your question should be answered in the affirmative.

This opinion does not construe or apply to any Federal law or regulation relating to the use of narcotics.

January 29, 1954.—054-19.

NATUROPATHIC EXAMINERS—STATE BOARD OF—
AUTHORITY—APPLICANTS—LICENSES—
SUSPENSIONS—EDUCATIONAL
REQUIREMENTS

QUESTIONS: 1. Does the Florida State Board of Naturopathic Examiners have authority to suspend the license of a member of the profession who has been adjudged and convicted by the federal courts for smuggling narcotics?

2. Does the Board have the power to enforce §462.18, F.S., 1953, providing for certain educational requirements before a renewal of the annual naturopathic license?

3. Is it imperative that the applicant be examined on the fourteen subjects prescribed in §462.05 F.S., 1953?

4. Can the Board, exercising such powers relative to the protection of public health and control and regulation of the practice of naturopathy, intervene or stop the practice of one licensed by the Board who conducts the practice of obstetrics in an office lacking in facilities and resources, thus endangering the patient and child?

To: *Dr. Julio Gavilla, Secretary-Treasurer, Florida State Board of Naturopathic Examiners, Tampa, Florida:*

Section 462.14, F.S., provides:

"The license or registration of a practitioner of naturopathy may be revoked, suspended or annulled, or such practitioner may be reprimanded, upon the following grounds:...

"(2) That he has been convicted of a felony. The conviction of a felony shall be the conviction of any offense which, if committed within the State of Florida, would constitute a felony under the laws of this state;"

Conviction of the crime specified in your first question and in the particular instance related by your letter is a felony under federal law and Florida law. (See 18 U.S.C.A., Section 1; 21 U.S.C.A., §§173 and 174; §398.22, F.S., 1953).

Section 462.15 F.S., prescribes the manner in which the Board is to proceed under §462.14, *supra*. This statute should be closely followed and every procedural safeguard therein provided for the accused, closely adhered to.

In view of the foregoing statutes giving the Board power to hold hearings and to suspend, revoke or annul the license of a practitioner of naturopathy who has been convicted of a felony, your first question is answered in the affirmative.

Replying to your second question, §462.08, F.S., 1953, provides, among other things, that an annual fee of five dollars shall be paid by every person licensed to practice naturopathy within this state on or before the first day of May of each year after a license is issued to such person, for a renewal of such license.

Section 462.18, F.S., 1953, provides:

"At the time each licensee shall renew his or her license as otherwise provided in this chapter each licensee, beginning with the license renewal due the first of May, 1944, in addition to the payment of the regular renewal fee, shall furnish to the state board of naturopathic examiners satisfactory evidence that, in the year preceding each such application for such renewal, he or she has attended the two-day educational program as promulgated and conducted by the Florida Naturopathic Physicians Association, Inc., or, as a substitute therefor, the equivalent of said program as approved by said board. The secretary of the state board of naturopathic examiners shall send a written notice to this effect to every person holding a valid license to practice naturopathy within this state at least thirty days prior to the first day of May in each year, directed to the last known address of such licensee and shall enclose with such notice proper blank forms for application for annual license renewal. All of the details and requirements of the aforesaid educational program shall be adopted and prescribed by the state board of naturopathic examiners. *In the event of national emergencies, or for sufficient reason, the Florida state board of naturopathic examiners shall have the power to excuse the naturopathic physicians as a group or as individuals from taking this postgraduate course.*" (Emphasis supplied.)

The last sentence in the foregoing section grants the Board the power to excuse the naturopathic physicians from taking the additional postgraduate work for sufficient reasons. What are sufficient reasons for so excusing said naturopathic physicians is a question of fact to be determined by the Florida State Board of Naturopathic Examiners.

The Board may effectively enforce §462.18 providing for the annual postgraduate study adopted and prescribed by the Board refusing to issue a renewal license. (See also §462.19) Your second question is answered in the affirmative.

Section 462.05, F.S., 1953, enumerates some fourteen different subjects in the curriculum of study in naturopathy. Also in the same section we find:

"...All examinations in said enumerated branches shall be in writing, but the applicant shall also be required to give a practical demonstration showing his knowledge and efficiency in such branches, as may be deemed necessary and practicable by the board... A license or certificate shall then be issued... to each applicant who shall pass said written examinations by a rating of seventy-five per cent on the questions provided in each of the subject named..."

The language of this section does not appear to be permissive, thereby indicating that the Board is not invested with the discretion to eliminate one or more subjects from the written examinations. As a matter of fact, the statute provides that the applicant must pass the written examination by a rating of seventy-five per cent on the questions provided "in each of the subjects named." Your third question is answered in the affirmative.

Under the provisions of §462.02, F.S., 1953, the Board is restricted in the exercise of powers and duties relating to the public health and/or the practice of naturopathy to that which is specifically prescribed and conferred upon it under Ch. 462.

Apparently the only powers and duties the Board has with respect to licensed practitioners of naturopathy are those contained in §462.14, F.S., setting forth the grounds for revoking annually or suspending a license or for reprimanding a practitioner, and §462.18, F.S., relating to renewal of license. There appears to be nothing in those two sections above or in the remainder of Ch. 462, F.S., which would authorize the Board to take disciplinary action in a situation as related by the question.

However, §462.11, F.S., 1953, provides as follows:

"Doctors of naturopathy shall observe and be subject to all state, county and municipal regulations in regard to the control of contagious and infectious diseases, the reporting of births and deaths, and to any and all other matters pertaining to the public health in the same manner as is required of other practitioners of the healing art." Section 455.04, F.S., provides:

"The responsibility for the enforcement of the laws relating to public health and the practice of medicine, surgery, chiropractic, naturopathy, nursing and midwifery shall rest upon all law enforcement officers of the State of Florida and the counties thereof and upon the state board of health acting through its duly appointed agents."

As a practical matter, it would seem that any violation of the laws of Florida with respect to the public health of this state and which the Board has no specific statutory authority in which to proceed in the correction thereof, that said violation should be brought to the attention of the authorities designated by §455.04, F.S., *supra*. In view of the foregoing, your fourth question is answered in the negative.

PHARMACISTS

February 26, 1954.—054-49.

BOARD OF PHARMACY—REGULATION OF SUNDRY STORES OPERATING AS DRUG STORES—§465.111, F.S.

Questions: 1. Does the Board of Pharmacy have the authority to adopt and enforce a regulation designed to stop the activity described below?

2. If so, how could such a regulation be worded, and against whom could it be directed in order to most efficiently curtail the described practice?

To: Honorable Russ J. Davis, Secretary, Board of Pharmacy, Lake City, Florida:

It has been observed by inspectors of the Florida Board of Pharmacy that certain sundry stores throughout the state are indulging in a business practice which gives the impression that they are licensed drug stores attended by licensed pharmacists and that they are authorized to fill prescriptions written by physicians. The report of the investigators revealed that the practice in these sundry stores, which have the general appearance of drug stores although they are not advertised as such, is to take prescriptions from physicians (either written ones handed to them by the patients or oral ones conveyed by doctors), send them to a drug store where they are filled and returned, and sell the prescribed drugs to the public as though they had been prepared or compounded by a druggist on duty in the sundry store. The Board is apprehensive that this practice may result in injury to the public and has proposed the adoption of a regulation which would prohibit the practice.

Although a careful analysis of the powers and duties of the Board might reveal that it had the authority to pass a regulation prohibiting a pharmacist or a retail drug establishment from selling or giving filled prescriptions to persons other than the one by whom they were intended to be used, thus prohibiting them from furnishing compounded drugs for resale by a sundry store, it seems that the Florida Pharmacy Act (Ch. 465, F.S.) already prohibits the activity described above as being conducted by some sundry stores.

Reference is made to paragraphs 1 and 2 of §465.002, F.S., which define the term "retail drug establishment" and the word "prescription". Reference is also made to §465.091, F.S., where penalties are provided for persons who illegally fill, compound, or

dispense prescriptions and for persons who illegally own or operate retail drug establishments.

The definition of a retail drug establishment includes "Every store, shop . . . or other place . . . where prescriptions are filled, compounded, or dispensed . . ." Although the sundry stores in question do not attempt to fill prescriptions or compound drugs, it does appear that the described activity on the part of these stores can be referred to as the dispensing of drugs or prescriptions. The word "dispense" is defined by Webster's as meaning "to deal or divide out in parts or portions; to distribute; as the steward dispenses provisions; the society dispenses medicines." In a number of cases the word "dispense" has been distinguished from words such as filling, compounding, and administering. In the following cases the word dispense, or dispensing, as used in regard to pharmaceuticals, is defined or dealt with in such a manner as to indicate that it means the selling or giving of drugs rather than the mixing, weighing, or compounding of drugs. (*Friedman v. State* 213 S.W. 418, 141 Tenn., 553; *U. S. vs. Reynolds*, D.C. Mont. 244 F. 991; *People vs. Cohen*, 157 NYS 591, 593, 94 Misc. 355; *Davis vs. Board of Medical Examiners*, 239 P. 2d 78, 82, 108 C.A. 2d 346.)

It is unfortunate that the words "dispense" and its derivatives are not used in their proper sense in the Pharmacy Act, but the intent of the Legislature is evident nonetheless. "Prescriptions," as defined in the Pharmacy Act, are properly spoken of as being filled, but it strains the meanings of the words "compound" and "dispense" when they are used in connection with the word prescription, as defined in the Act. Technically, a pharmacist does not compound or dispense prescriptions.

Drugs are compounded in filling prescriptions and the filled prescriptions, consisting of combinations of drugs, are dispensed to the public. Despite the inaccuracy in the use of the word "dispense", it is evident that the Pharmacy Law intends to prohibit the dispensing of drugs compounded in accordance with a doctor's prescription unless such dispensing is done by a licensed pharmacist or some one over whom he has direct supervision. (It is well to observe, at this point, that the sale by merchants of patent or proprietary preparations is not prohibited by the Pharmacy Act where they are sold only in original or unbroken packages. See paragraph 3, §465.002, F.S.)

Having considered this line of reasoning in connection with others that are available, it may be concluded that the practice described above subjects the seller of such drugs to the penalty prescribed in paragraph 5 of §465.091, and that it also brings the sundry store within the definition of a retail drug establishment, since it is a store where prescriptions, or rather the drugs compounded in the filling of prescriptions, are dispensed.

Therefore, it is my opinion that the Board has no need to adopt a regulation such as contemplated by the first question herein. The matter is already covered by law and appropriate penalties are provided. In regard to the second question, the Board may, if it agrees with the interpretation given in this opinion, adopt a rule

of construction explaining that interpretation and urging that the proper law enforcement authorities follow it. The drug inspectors of the State Board of Health are required by §465.111, F.S., to enforce the rules and regulations of the Board and the Board itself may, under §465.092, stop the activity complained of herein by injunction.

DENTISTRY AND DENTAL HYGIENE

April 26, 1954.—054-99.

BOARD DENTAL EXAMINERS—AUTHORITY TO EMPLOY ATTORNEY—PERMANENT INJUNCTION— DENTAL LAW VIOLATORS

QUESTION: Is it possible for the Board of Dental Examiners to hire an attorney in Orlando to try and obtain a permanent injunction against a dental law violator?

To: *A. W. Kellner, D. D. S., Secretary-Treasurer, Board of Dental Examiners, Hollywood, Florida:*

Section 466.29, F.S., authorizes the Dental Board to proceed in the proper court to obtain an injunction against the unauthorized practice of dentistry.

Since proceedings of this nature should clearly be presented to the court by an attorney, I am of the opinion that the Board is authorized to employ an attorney for this purpose.

Your question is answered in the affirmative.

October 12, 1954.—054-234.

DENTIST—SUPERVISION OF DENTAL HYGIENIST

QUESTION: Is it necessary that the dentist under whose supervision a dental hygienist works be personally present while the hygienist performs her duties?

To: *Honorable Thomas D. Beasley, County Prosecuting Attorney, DeFuniak Springs, Florida:*

Section 466.38, F.S., in defining the duties of a dental hygienist, states, in part:

"Dental hygienists may remove lime deposits, accretions and stains from the exposed surfaces of the teeth directly beneath the free margin of the gums, but shall not perform any other operations on the teeth or mouth or any diseased tissues of the mouth. Dental hygienists may perform their duties only in the office of a registered and licensed dentist and *under the supervision* of such dentist." (Emphasis supplied).

"Supervision" means "Act of overseeing; inspection; superintendence; oversight". (Webster's New International Dictionary.)

I think that the Legislature intended that the words in said §466.38, "under the supervision of such dentist", should mean under the *general* supervision, rather than under the *direct* supervision, of the dentist for whom the dental hygienist works. Said section was enacted as §38 of Ch. 20240, Acts of 1941, and it appears from the following quotation from §3 of said Ch. 20240 (now §466.03, F.S.) that when the Legislature meant "direct supervision", as distinguished from "general supervision," it said "direct supervision", to wit:

"Nothing in this Chapter shall apply to the following...:

"(2) To the giving by qualified anaesthetist or registered nurse of an anaesthetic for a dental operation *under the direct supervision* of a licensed dentist;..." (Emphasis supplied).

Therefore, it appears that when the Legislature intended a direct supervision by a dentist, it clearly stated the proposition; and when only a general supervision was intended to be required, the word "direct" was omitted.

Also to be considered in interpreting the legislative intent is the number of dental hygienists permitted to be employed by any one dentist and by public institutions of the State of Florida. In the first instance, under §466.38 any one dentist may employ two dental hygienists. If he had two, and if it were necessary for him to directly supervise the work of each, he might be placed in the highly impractical position of having to stop his own work and also let one hygienist remain idle while he directly supervised the work of the other.

In the second instance, under §466.38 state institutions may employ any number of dental hygienists to work "under the supervision of a licensed dentist". Since the Legislature thus permitted any number of dental hygienists to be employed in state institutions without requiring that their work be conducted under the *direct* supervision of a licensed dentist, it follows that the Legislature did not intend to require direct supervision, since, if several say 5 or 10, dental hygienists were under the supervision of one dentist, it would manifestly be impractical, if not impossible, for him to do his dental work and at the same time directly stand over each of the 5 or 10 dental hygienists who might be working on patients.

From the foregoing, it is my opinion that the duties of a dental hygienist, defined by §466.38, are to be carried out only under the general supervision of a licensed dentist but that the said dentist need not be hovering over her shoulder and directing the work which she has been proven qualified to undertake.

Therefore, your question is answered in the negative.

VETERINARIANS

December 27, 1954—054-272.

FLORIDA LIVESTOCK BOARD—COUNTY AGENTS—
VACCINATION OF HOGS

QUESTION: Does Ch. 474, F. S., prohibit the vaccination of hogs, with hog cholera anti-serum and virus and vaccine, by county agents, who are not licensed veterinarians, although such agents are recognized and approved by the Florida Livestock Board pursuant to §585.32, F. S.?

To: State Board of Veterinary Examiners, Hollywood, Florida:

Section 474.07, F. S., defines the practice of veterinary medicine and surgery, which definition includes administering "any medicine, or any biologic preparation, either as a cure or preventive for any disease" to any animal for a consideration; however, the said section expressly excludes owners of animals who administer to the ills and injuries of their own animals. Section 474.13, F. S., makes certain other exceptions not here material. Said §474.07, F. S., would appear to be sufficiently broad to include the vaccination of hogs with hog cholera anti-serum and virus and vaccine. This section standing by itself would seem to require an affirmative answer to the above question; however, other sections of the statutes of this State must be construed with said Ch. 474, F. S.

Section 585.32, F. S., provides for the purchase and distribution of hog cholera anti-serum and virus and vaccine and its distribution "through employees of said Board (Florida Livestock Board), licensed veterinarians and *recognized and approved agents of the state and federal governments*, upon applications therefor upon forms to be furnished by said Board and approved by the administrator of said serum and virus and vaccine." See also §585.-321, F. S., extending to the above mentioned persons and to others under the circumstances therein mentioned; this section was derived from a 1945 enactment. The above mentioned provisions in §585.32 are also found in substantially the same form in Chapters 15867, 17059, 18153, 19006, 21638, 22517 and 26895, Laws of Florida, Acts of 1933, 1935, 1937, 1939, 1945 and 1951. Special attention is directed to Ch. 15618, Laws of Florida, Acts of 1931, Section one of which provides for the distribution of anti-hog cholera serum and virus "through employees of said Board (State Livestock Sanitary Board), licensed veterinarians and *recognized and approved agents of the state and federal government...*" Section two of this act requires that the application for the serum and virus "shall have the endorsement of some authorized and approved administrator as provided in *section one of this act*." The administrators approved in section one include *agents of the state and federal government*.

Prior to the 1931 enactment "only those veterinarians, county agents or laymen who have been granted permits allowing the use of anti-hog cholera serum and hog virus, by the State Livestock Sanitary Board, shall be permitted to inoculate with anti-hog cholera serum and hog cholera virus." (Ch. 12048, Laws of Florida, Acts of 1927; to the same effect see also Chapters 9329 and 7919, Laws of

Florida, Acts of 1923 and 1919). County agents are appointed by the Commissioner of Agriculture upon the designation and suggestion to him by the national state agent of farmers' cooperative demonstration work. These agents operate under the same rules and regulations as do county agents employed by the national government (§593.08, F.S.).

The former State Livestock Sanitary Board, as well as the present Florida Livestock Board, has for many years last past (going back for at least twenty years) construed the above mentioned statutes as authorizing the said boards to recognize and approve county agents to distribute and administer anti-hog cholera serum and virus and vaccine pursuant to said §585.32, F. S., and prior statutes and laws. This practice has been well known and no attempt has been made by the Legislature to change the statute and adopt another rule. Section 585.32, F. S., appears to be the later statute in point of time under the rule announced in Hillsborough County Commissioners v. Jackson, 58 Fla. 210, 50 So. 423, text 424, and subsequent cases following the said case.

For the reasons stated, the above question is answered in the negative.

October 21, 1954.—054-240.

BARBERS' SANITARY COMMISSION—BARBER SERVICES— PRICE FIXING POWERS UNCONSTITUTIONAL

QUESTION: "Does the Barbers' Sanitary Commission have authority to fix prices to be charged for barber services as provided by §467.27, F.S.?"

To: *Honorable C. R. Rankin, Chairman, Barbers' Sanitary Commission:*

In my opinion, the Supreme Court of Florida has ruled, in the case of Robbins vs. Webb's Drug Co., 16 So. 2d 121, that §467.27, F.S., is an unconstitutional delegation of legislative powers in so far as it authorizes the Barbers' Commission to fix prices. It would, therefore, appear that the price fixing powers provided in this section are no longer in effect. Your question is therefore answered in the negative.

BARBERS

June 23, 1953.—053-130.

BARBERS' SANITARY COMMISSION MEMBERS—DUTIES— COMPENSATION—PER DIEM AND MILEAGE FOR NECESSARY TRAVEL ON OFFICIAL BUSINESS

QUESTIONS: 1. Under the provisions of §476.18, F.S., as amended by House Bill 1489, may the Barbers' Sanitary Commission set a reasonable compensation or salary for its several members, other than the compensation of \$10.00 per day allowed while attending official board meetings (paragraph three of §476.18, House Bill 1489), particularly in view of that portion of said

§476.18, contained in paragraph four wherein it is stated, "... the commission shall fix the salary and compensation of its several members ..."?

2. If the Barbers' Sanitary Commission may set such a reasonable compensation or salary for these duties, other than official board meetings, would per diem and mileage be payable for necessary travel in connection with such other duties?

To: Honorable William G. O'Neill, Attorney for Barbers' Sanitary Commission:

Section 476.18, F.S., was amended by the 1953 legislature (House Bill 1489). It now provides, in part:

"Each member of the board shall receive ten dollars (\$10.00) per day or any part of a day, while attending official board meetings, not to exceed twelve (12) meetings per year, and shall receive per diem and mileage as provided in §112.061, Florida Statutes, from place of their residence to place of meeting and return.

"Subject to the limitations and provisions of this section and chapter, the commission shall fix the salary and compensation of its several members and secretary; ..."

Unfortunately the above quoted section of the law is not altogether clear as to the intention of the legislature regarding the compensation authorized for board members of the Barbers' Sanitary Commission. In one paragraph it fixes their compensation at \$10.00 per day for attending official board meetings and in the next paragraph authorizes the board members to fix their own salary.

Governor McCarty wrote to me on June 17, 1953, regarding this problem. In his letter he states:

"It is my feeling that the intent of the Legislature was to set a sum of ten dollars per day for members of the Barbers' Sanitary Commission for use during times when the members are engaged in official meetings or examinations conducted by the Commission. I do not believe that it was the intent of the Legislature that this allowance should take the place of a reasonable remuneration for other actual services rendered by members of the Commission. A study of the budget of the Barbers' Sanitary Commission indicates that a total compensation including the ten dollars per day allowance should not exceed approximately \$200.00 per month."

In your letter to me you gave the following explanation of the duties of the members of the Barbers' Sanitary Commission:

"The three members of the Barbers' Sanitary Commission under Chapter 476, Florida Statutes, are charged with the duty and responsibility of enforcing and administering all of the laws concerning barbers and barbering in the State of Florida. Besides preparing the examina-

tions to be given applicants for apprentice barber certificates, barber certificates and certificates for the teaching of barbering, they conduct written and practical examinations, establish policies, supervise the State office, receive complaints from other barbers or interested citizens, and oftentimes upon receiving complaints go out into the field and inspect barber shops to see that the complaints, if valid, are corrected.

"It is my understanding of the operation of the Barbers' Sanitary Commission, in the past, that the Commissioners have each drawn a salary of \$175.00 monthly for the duties imposed upon the said Commissioners by Chapter 476, Florida Statutes.

"The many duties that devolve upon the Commissioners under Chapter 476 require attention and time outside of regular board meetings and the Commissioners should be reasonably compensated for such duties."

With reference to your statement that "In the past the Commissioners have each drawn a salary of \$175.00 monthly," I would like to point out that apparently this was accomplished by the board members employing themselves as inspectors.

On May 16, 1946, my predecessor in office issued Opinion 046-205 to the State Board of Engineer Examiners dealing with the question of whether said board could employ its own members as field representatives. In this opinion the following statement was made:

"In answer to your second question it is my opinion that the State Board of Engineer Examiners shall not employ one of its members to perform such services. I am aware of the fact that the courts are not in accord on this question of law but the majority opinion is that such contracts are against public policy."

Since the problem was identical as applied to the Barber Board, the state auditor in successive audits has criticized the Barber Board for its action in employing itself as inspectors for the board.

In my opinion, Attorney General's Opinion 046-205 was correct but does not now apply to the problem at hand, inasmuch as the 1953 legislature by House Bill 1489 amending §476.18 has now specifically directed the Commission to "fix the salary and compensation of its several members," this direction, however, being made subject to the limitation that the legislature in said section has itself fixed the compensation for attending board meetings at \$10.00 per day for each member. The Governor in his letter of June 17 referred to above states that from a study of the Commission's requested budget and the newly enacted legislation, the intent appears to allow other remuneration in addition to \$10.00 per day for attending board meetings, not to exceed, however, a total compensation of \$200.00 per month.

The additional compensation contemplated herein will not be

a fixed monthly salary but will be an amount fixed by the board on a per diem basis to compensate themselves for duties performed exclusive of attendance at board meetings. In no event will the total compensation of a board member exceed the \$200.00 per month recommended by the Governor. Subject to the above comments, your first question is answered in the affirmative.

With regard to your second question, I believe that it should also be answered in the affirmative since the duties contemplated would fall within the provision of §112.061 providing for per diem and travel expenses for state officers and employees while engaged in travel on state business.

FLORIDA BEAUTY CULTURE LAW

November 12, 1953.—053-305.

SCHOOL OF BEAUTY CULTURE—POST GRADUATE COURSE —QUALIFICATIONS—§477.08 (2), F.S.

QUESTIONS: 1. Is it lawful for a School of Beauty Culture to conduct a post graduate course if the time required does not exceed six weeks?

2. If so, may the school re-enroll students after one post graduate course has been completed?

To: *Honorable Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

Section 477.08(2), F.S., provides, among other things:

"...No school of beauty culture shall conduct a post graduate course unless the time required for completing same does not exceed a maximum of six weeks. No school of beauty culture shall enroll or admit any student in a post graduate course thereof, which said post graduate course shall be for the purpose of qualifying persons to pass the examination conducted by the board to determine fitness to practice beauty culture, unless such student shall file, in duplicate, an application duly verified, which said application shall be obtained by such student or school from the state board of beauty culture and shall be such form as prescribed by said board. Said application shall also show that the applicant has completed the tenth grade in school, or its equivalent, and that such applicant has either (a) graduated from a school of beauty culture approved by the board, (b) holds a valid, unexpired and uncanceled certificate of registration as a registered junior operator, or (c) who can prove by sworn affidavits that he or she has practiced as a beautician, manicurist and pedicurist in another state or country for at least five years immediately prior to making such application..."

Your first question is answered in the affirmative.

Replying to your second question, it appears that there is no restriction on the number of times a student may take a post

graduate course, provided he or she qualifies for such course as outlined in §477.08(2) as quoted above.

Further commenting on the statements contained in your letter, it may be that your objections to the present situation may be overcome by placing additional restrictions on the services performed by post graduate students while in school, rather than by an attempt to limit one's educational training. If this cannot be done under the Board's present authority to regulate Schools of Beauty Culture, legislation along such lines may be considered.

OUTDOOR ADVERTISERS

September 4, 1953.—053-230.

BUSINESS OF OUTDOOR ADVERTISING—BEVERAGE DEALER—LICENSES

QUESTION: Does a business concern engaged in the production and sale of beverages, which manufactures signs for the purpose of display, upon which its product is advertised, and upon which is also advertised the nature of business and the nature of commodities dealt in and sold by retail dealers through whom its product is marketed, which signs are furnished to and erected upon the premises from which such dealers transact their business, come within the statutory definition of "Business of Outdoor Advertising" (§479.01, F.S.) so as to require such concern to secure a license under the provisions of §479.04, F.S.?

To: Honorable Richard H. Simpson, Chairman, State Road Department:

The answer to your question lies within the interpretation and construction of the statutory definition of "Business of Outdoor Advertising" Section 479.01(4), Florida Statutes, which reads as follows:

"'Business of outdoor advertising' means the business of constructing, erecting, operating, using, maintaining, leasing or selling outdoor advertising structures, or outdoor advertising signs or outdoor advertisements."

Other pertinent sections of the statute are:

Section 479.04 which reads in part as follows:

"479.04 Licensed outdoor advertisers.— No person shall engage or continue in the business of outdoor advertising in this state outside the corporate limits of any city or town without first obtaining a license therefor from the state chairman; and no person shall construct, erect, operate, use, maintain, lease or sell any neon, outdoor advertising structure or outdoor advertising sign or outdoor advertisement of any kind in this state outside the corporate limits of any city or town without first obtaining such license from the state chairmen..."

Section 479.07 which reads in part as follows:

"479.07 Individual device permits; fees. — (1) Except as in this chapter otherwise provided, no person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used or maintained any advertising structure, outdoor advertising sign or outdoor advertisement, outside any unincorporated city or town, without first obtaining a permit therefor from the chairman and paying the annual fee therefor, as herein provided. The chairman shall not issue such a permit to any person who has not obtained the license provided for in §479.04 of this article. Those signs constructed, erected, operated, used or maintained by the owner or lessee of a place of business or residence, and relating solely to merchandise, services or entertainment sold, produced, manufactured, or furnished at such place of business or residence wherever found shall be exempt from the payment of the license tax provided by this chapter but subject to the provisions herein as to permits."

Section 479.16 which reads in part as follows:

"479.16 Certain advertisements excepted. — The following advertisements, advertising signs and the advertising structures, or parts thereof, upon which they are posted or displayed, are excepted from all the provisions of this chapter except those contained in subsections (2), (3) and (4) of §479.11 hereof:

"(1) Those constructed by the owner or lessee of a place of business or residence on land belonging to said owner or lessee and not more than one hundred feet from such place of business or residence, and relating solely to merchandise, services or entertainment sold, produced, manufactured or furnished at such place of business or residence, are excepted from the permit fee, but do not exempt the license of a contractor who is engaged in the manufacture, erection or maintenance of such advertising sign; . . ."

Assuming that the business concern engaged in the production and sale of beverages does no more than gratuitously donate said advertising signs or the privilege of displaying the same without charge to the owner or lessee of the place of business and the same are so accepted by the owner or lessee and displayed on or not more than one hundred feet from such place of business, and such signs relate solely to merchandise, services or entertainment sold or furnished at said place of business, it is my opinion that such transaction would not constitute the business concern, a firm engaged in the business of outdoor advertising. Such a concern is not a contractor engaged in the business of manufacturing, erecting and maintaining advertising signs on a contractual basis usually for stipulated rental or other contractual compensation.

The words "those constructed by the owner or lessee" in §479.16(1) have never been given the interpretation that the advertising signs must actually be manufactured or made by the owner or lessee, but rather that the same may be procured and

erected and maintained by the owner or lessee on or within one hundred feet of his place of business.

This opinion is based solely on the assumption of the facts set forth above and is not to be considered with relation to any other factual situations or circumstances.

MASSEURS AND MASSEUSES

March 30, 1954.—054-77.

FLORIDA BOARD OF MASSAGE—INSPECTORS— AUTHORITY—MASSAGE DEPARTMENT OF PRIVATE CLUB

QUESTION: Do the inspectors of the Florida Board of Massage have the authority to inspect the massage department of a private club in which only members of the club are patrons and outsiders are not permitted?

To: *Mrs. Edith Dearborn, Secretary-Treasurer, Florida Board of Massage, Miami, Florida:*

Section 480.01(1)(2), F.S., quoted below, defines "masseur", "masseuse", and "massage establishment".

"(1) MASSEUR AND MASSEUSE.—As the following subjects and methods of treatments besides study of underlying principles of anatomy and physiology are generally included in a regular course of study by a recognized and accredited school of massage or like institution, viz: The art of body massage, either by hand or with any mechanical or electrical apparatus for the purpose of body massaging, reducing or contouring, the use of oil rubs, salt glows, hot and cold packs, tub, shower, sitz and similar baths, cabinet baths, excluding fever therapy. Therefore under the meaning of this chapter the term "Masseur" or "Masseuse" shall be deemed to be a person who practices, administers or teaches all or any one or more of the above named subjects and methods of treatments."

"(2) MASSAGE ESTABLISHMENT. — The term 'massage establishment' as used in this chapter shall be construed and deemed to mean any shop, establishment or place of business wherein all or any one or more of the named subjects and methods of treatments, as defined in subsection (1) of this section, are administered or practiced."

Section 480.05(3), F.S., gives the Board the power and makes it a duty of the Board to examine and inspect "all massage establishments." Section 480.03 exempts certain classes of persons from the provisions of this chapter. A private club is not included within the classes of exemption under this section.

The purpose of Ch. 480 relating to masseurs and masseuses as stated by the Legislature is that it is "an act to protect the health,

safety and welfare of the people of the State of Florida." It appears then that the purpose is not exclusively to regulate a business, but it is legislation designed primarily to regulate the therapeutic practice of massage, whether in a private club or an establishment catering to the public generally. Reduced then to its simplest term, is a private club "any establishment" as set out in §480.01(2) F.S., *supra*?

The word "establishment" encompasses many things. It can be, for example, a school, church, business, home, etc. (Webster's New International Dictionary, Second Edition, Unabridged)—It is the place where one is permanently fixed for residence or business including the grounds and fixtures, also an institution or place of business with its fixtures and organized staff.

Our Florida Court has not defined establishment or as in this specific instance, pointed out just what the word includes. However, in at least two other jurisdictions it has been held that a private club was included within the term establishment as used in regulatory legislation. *Detroit Athletic Club v. Liquor Control Commission*, 6 N.W. 2d 740 (Mich.); *McElhoue v. Philadelphia Quattittle Club*, 53 Pa. Super. 262.

As it has been pointed out by our court in *Gillett v. Florida University of Dermatology*, 197 So. 852, which refers to legislation of a similar nature regulating the practice of beauty culture, indicates that the purpose of these regulatory acts are to "protect the public generally from unsanitary and unhealthy conditions"—and to prevent the spreading of communicable diseases. Private rights must always be subordinated to public rights and public health. *State v. City of Miami*, 27 So. 2d 118, 157 Fla. 726.

We are of the opinion that under the situation as described in your letter wherein a registered masseur practices the therapeutic art of massage upon individuals at a prescribed location and we assume for which the masseur is compensated, that agents of the Board in accordance with the terms of the statute have the right to investigate the sanitary conditions under which the massage is administered (Section 480.10, F.S.) and would include a private club. We do not think that the term "any establishment" is restricted solely to "commercial establishments", but instead includes any establishment in which massage is practiced and administered wherein a danger to public health may exist thereby. If the act were so restricted it would present a serious enforcement problem to the Board of Massage and open an avenue for evasion.

The function of statutory construction is to further and not to defeat the purpose of the legislation. The sole object is to discover and fix the true sense and meaning of the legislation and once that is found that is the law. Generally in construing and interpreting a statute the courts may consider the evil to be corrected, the language of the act, including its title, the history of the enactment, and the state of the law already in existence bearing on the subject. *Smith v. Ryan*, 39 So. 2d 281 (Fla.).

Construing Ch. 480 in its entirety and in view of the foregoing, I am of the opinion your question should be answered in the affirmative.

December 29, 1954—054-275.

**MASSEURS AND MASSEUSES—QUALIFICATION FOR
REGISTRATION—OATH—FELONY CONVICTION—
VIOLATION OF FEDERAL STATUTES**

QUESTION: Is a person entitled to be registered and issued a certificate of registration as masseur, masseuse or for a massage school when said person is unable to make oath that he has never been convicted of any offense that is a felony in Florida, or any other state or country, for the reason that said person has offended the Federal Statutes pertaining to the Selective Service and Training Act of 1940 and was convicted and sentenced to a term of three and one-half years in the federal penitentiary at Lewisburg, Pennsylvania?

To: Mrs. Edith Dearborn, Secretary-Treasurer, Florida Board of Massage, Miami, Florida:

Section 480.06, F. S., provides among other things that, in order to be entitled to be registered and to be issued a certificate of registration as a masseur, masseuse or for a massage school, the applicant "shall make oath that he or she has not been convicted of any offense that would constitute a felony, either in Florida or any other state or country." When the above conviction was returned, a felony under the Federal Statutes was defined as an offense against the United States which carries a sentence of more than one year in prison upon conviction. 18 U. S. C. 541, 1946 Edition. (Mar. 4, 1909, Ch. 321, §335, 35 Stat. 1152; Dec. 16, 1930, Ch. 15, 46 Stat. 1029.) The Statute under which the conviction was had did not itself declare the nature of the crime.

Therefore, it is my opinion that if a person has offended the statutes of the United States and has been convicted and sentenced therefor to a term of three and one-half years in a federal penitentiary, as stated, such person cannot qualify under the laws of Florida for registration and licensure as a masseur, masseuse or operator of a massage school.

April 1, 1953.—053-75.

**MASSEURS—CERTIFICATE OF REGISTRATION—LICENSES
—BUSINESS ESTABLISHMENT—CH. 480, F.S.**

QUESTION: Is a licensed masseur required to have an established place of business or may he travel around performing the duties of a masseur without having, or being employed by, said establishment or place of business?

To: Honorable John D. Marsh, County Solicitor, Dade County, Miami, Florida:

We must construe statutes enacted by the Legislature by interpreting the language as actually expressed in the statute. Section 480.02(3), F.S., 1951, provides as follows:

"It shall be unlawful for any person or persons to practice any branch of massage as defined in subsection (1) of

§480.01 of this chapter, either for payment or free demonstrations without first being a registered masseur or masseuse under the provisions of this chapter, or without operating and maintaining a bona fide and duly licensed massage establishment, or being employed in such establishment, and without first paying a license fee to the State of Florida. No occupational license, state, county or city, shall be issued to any person unless he or she shall have in his or her possession a certificate of registration, duly authorized and signed by the board of massage examiners."

Under the provisions of this statute the Legislature has expressed its intent clearly by providing that it shall be unlawful for any person or persons to practice massage without being registered under the law or without operating or maintaining a bona fide and duly licensed massage establishment or being employed in such establishment or without obtaining a license from the State.

The intent of the Legislature is further evinced to show that a masseur must display his license in his place of practice and such must be recorded in the office of the Clerk of each county wherein such masseur practices as provided by §480.08. However, it is my opinion that it is permissible for a masseur who is licensed to practice in this State and who either has a place of business or has a business establishment or is employed in such a business establishment, to make professional visits from such establishment in order to reasonably perform the duties of a masseur.

DISPENSING OPTICIANS

March 19, 1954.—054-69.

DISPENSING OPTICIANS—LICENSES

QUESTION: May a person, partnership or corporation operate more than one place of business as a dispensing optician under a single occupational license obtained pursuant to §484.10, F.S., or must an occupational license be obtained for each place of business?

To: Honorable C. M. Gay, State Comptroller:

"Natural persons, partnerships or corporations may engage in the trade or occupation of dispensing opticians, but each place of business maintained in the State shall have a duly licensed dispensing optician to supervise the preparing, fitting and adjusting of optical devices..." (§484.01, F.S.). The statute clearly designates the business of a dispensing optician as a trade or business, and it is nowhere referred to as a profession. It is "unlawful for any licensing agency, either state, county or municipal, to issue an occupational license to practice as a dispensing optician unless the applicant therefor shall first exhibit to such official a current certificate issued by the State Board of Dispensing Opticians, showing that the applicant has been qualified by said Board to practice as a dispensing optician in accordance with the terms of" Chapter 484, Florida Statutes. (§484.10 F.S.). No provision is made in

the statute for the examination of partnerships and corporations and their qualification as dispensing opticians under the regulatory terms of said Ch. 484, F.S., although they may engage in the trade or occupation of dispensing opticians. (see §484.01, F.S.) We find nothing in the statute requiring that a partnership or corporation qualify professionally as a dispensing optician; however, any place of business operated by a partnership or corporation must have "a duly licensed dispensing optician to supervise the preparing, fitting, fitting and adjusting of optical devices" sold by it.

Under §484.10, F.S., "any person, partnership or corporation, engaged in the trade or occupation of dispensing optician shall pay an occupational license tax of ten dollars per year for the privilege of engaging in such trade or occupation, *said license to be paid in accordance with the laws regulating the payment of occupational taxes.* Said ten dollar license tax shall be paid for State license; county and municipal taxes shall be in a sum as now required by law, not to exceed five dollars per year..." Before an occupational license may be issued to any person to follow the trade or occupation of a dispensing optician he must exhibit to the licensing authority a certificate issued to him by the State Board of Dispensing Opticians; however, when such application is made by a partnership or corporation a showing should be made that there will be a duly certified person in charge of the business. According to the general statutes (Ch. 205, F.S.) *regulating the payment of occupational taxes*, a separate occupational license is required for each separate place of business.

The above question is answered in the negative; a separate occupational license should be required of each separate place of business.

April 26, 1954.—054-100.

LICENSE TAXES—PHYSICIANS AND OPTOMETRIST— EMPLOYEES PREPARING GLASSES

QUESTION: Where one or more physicians maintain an optical laboratory and employ trained personnel to operate the same under their direct supervision, should such trained personnel obtain an occupational license?

To: Honorable C. M. Gay, State Comptroller:

Unless the contrary should appear to a tax collector he should assume that the laboratory is under the direct supervision of the physicians maintaining it as a part of their medical office or establishment. Nothing in Ch. 484, F.S., "shall be construed to mean that an employee of a licensed physician or licensed optometrist shall be required to secure a license under this chapter, so long as said employee is working exclusively for and under the direct supervision of said licensed physician or said licensed optometrist and does not hold himself out to the public generally as a dispensing optician." §484.07, F.S. Whether or not there is a violation of this section is primarily a matter for those charged with the enforcement of said Ch. 484. We know of no statute expressly prohibiting physicians and optometrists grinding, preparing and supplying their

patients with glasses, instead of issuing prescriptions to be filled by others.

Unless it is otherwise clearly apparent to the tax collector that a person purporting to be employed by a physician or optometrist and to be working under their direction and supervision is in truth and in fact working as a dispensing optician within the purview of Ch. 484, F.S., instead of an employee, it should be assumed that the said person is an employee and not engaged in a profession, occupation or business for himself and no license should be required. Whether or not the person may be violating Ch. 484, F.S., is not the tax collector's direct obligation; he is not charged with the enforcement of said statute.

The above question is answered in the negative, unless it readily appears to the tax collector that the relationship is not that of an employee but of a dispensing optician.

CHAPTER XXXI

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

MILK COMMISSION

August 11, 1953.—053-198.

MILK COMMISSION—PRICE FIXING PROHIBITED—PUBLIC SCHOOLS AND CHARITABLE ORGANIZATIONS

QUESTIONS: 1. Does §501.04, F.S., as amended by Ch. 28137, Acts of 1953, prohibit the Florida Milk Commission from fixing the price to be paid to the producer by the distributor for all milk to be sold and delivered to public schools and to charitable organizations?

2. What schools are to be classed as public schools?

3. What shall be considered "all charitable organizations of a public or semi-public nature who buy milk for free distribution to the needy?"

To: *Honorable L. K. Nicholas, Jr., Administrator, Florida Milk Commission, Jacksonville, Florida:*

Section 501.04, F.S., as amended by Ch. 28137, Acts of 1953, provides as follows:

"The Florida Milk Commission is hereby expressly prohibited from fixing the price of milk sold and delivered to lunch rooms of the public schools of Florida for consumption by students therein, and to all charitable organizations of a public or semi-public nature who buy milk for free distribution to the needy."

Replying to question one, it is my opinion that the Florida Milk Commission shall not fix the price of milk at any level, either on the price to be paid to the producer or to the distributor, when said milk is to be sold and delivered to lunch rooms of the public schools of Florida for consumption by students therein, or to charitable organizations buying and distributing milk to the needy.

As to question two, Ch. 501, F.S., relating to the Milk Commission does not define public schools. Therefore, we must resort to other laws for a definition. Section 227.13(a), F.S., defines public schools as follows:

"*Public schools.*—The public schools shall consist of nursery schools and kindergarten classes; elementary and secondary school grades and special classes; adult, part-time, vocational, and evening schools, courses, or classes authorized by law to be operated under the control of county boards."

It is my opinion that the foregoing definition should govern. Universities and colleges of either a public or private nature are not to be included.

As to question three, apparently the Legislature intended to extend the exemption in question to all charitable organizations whether governmental or privately operated if the organization in question distributes milk free of charge to the needy; the Legislature clearly intended for this definition to be given a liberal interpretation and in my opinion any legitimate organization engaged in charitable work for the public would come within the exemption if it distributes free milk to the indigent as a regular and recognized part of its program.

HOTEL AND RESTAURANT COMMISSION

December 5, 1953.—053-321.

HOTELS—APARTMENTS—MOTOR COURTS—SPACE HEATERS—LIMITATIONS UPON USE— REGULATIONS—ENFORCEMENT

QUESTIONS: 1. Does the Hotel and Restaurant Commissioner have the authority to enforce the proposed regulation against space heater installations which were made prior to the date that the regulation will become effective and which were in conformity with the regulations which existed when they were installed?

2. What procedure should the Hotel and Restaurant Commissioner follow in securing compliance with the regulation?

To: Honorable Mack Humphrey, Hotel and Restaurant Commissioner:

The regulation in question, described as Florida Hotel and Restaurant Commission Bulletin No. 8-A, has to do with the proper installation and equipment of space heaters in hotels, apartment houses, rooming houses, and motor courts. It is now a new regulation. It simply rewords and explains in more detail the provisions of previous regulations and particularly those of a previous Bulletin No. 8, which embodied the same requirements as to the venting of heaters in rooms equipped for sleeping, and which has been in force since September 15, 1953.

Because of the several recent and tragic deaths caused by asphyxiation and suffocation in the rooms of hotels, apartment houses, rooming houses, and motor courts, and in order to avoid more deaths from such causes, it is proposed to reissue in more detail the regulation concerning proper space heater installation and to greatly increase the Commission's efforts to secure prompt and full compliance with nationally accepted standards for the safe and healthful use of such appliances. This action will in many instances require that permanent and unclosable openings be constructed, at considerable expense to the owner of an establishment, in rooms that have not previously been so supplied with such openings.

In Ch. 28129, Laws of 1953, which re-establishes the Hotel and Restaurant Commission, it is provided in §509.04, that "The Hotel and Restaurant Commissioner shall make such rules and regulations as are necessary to carry out the provisions of this chapter in accordance with its true intent." In §509.03, F.S., it is provided in part that, "The Hotel and Restaurant Commissioner shall carry out and execute all of the provisions of this chapter and all other laws now in force or which may hereafter be enacted relating to the inspection or regulation of hotels, apartment houses, rooming houses or restaurants."

Section 511.13, F.S., provides in part that "Every hotel, rooming house, apartment house, tenement house... in this state shall be properly plumbed, lighted, heated and ventilated and shall be conducted in every department with strict regard to health, comfort, and safety of the guests or tenants..."

It has been repeatedly held that the possession and enjoyment of all rights are subject to the police power and that persons and property are subject to restraints and burdens necessary to secure the comfort, health, welfare, safety and prosperity of the people.

The proposed Bulletin 8-A, when effectuated, will be a regulation under the police power of the state and as such must not be repugnant to the provisions of the state or national constitutions. From the nature of the first question set out herein it is assumed that the primary concern as to the validity of the proposed regulation lies in the possibility that it might be considered as being retrospective, thereby depriving certain operators of previously vested rights.

In 11 Am. Jur., Page 1200, in a statement supported by extensive authorities, it is stated that: "There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate on a particular subject. In no case is there an implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. Every citizen in making his arrangements in reliance on the continued existence of laws takes on himself the risk of their being changed, and the state incurs no responsibility in consequence of the change proving injurious to his private interests." In *Taylor v. Trianon Amusement Co.*, 200 So. 912, 146 Fla., 447, it was said that: "It cannot be denied that property rights are protected by the fundamental law but the courts in the protection of these constitutional rights of property have never held that the use thereof cannot be regulated under the police power."

On the basis of the foregoing it is my opinion that your questions should be answered as follows:

1. The Hotel and Restaurant Commissioner may enforce the provisions of proposed Bulletin 8-A, by requiring that every person to whom it is applicable shall make every room and space heater conform to the provisions of the regulation regardless of whether the heaters or rooms were in conformity with the regulations of the

Commission which existed at the time they were installed or constructed.

2. The procedure for the enforcement of this proposed regulation should be the same as that followed in enforcing the other regulations of the Commission. Particular care should be taken, however, to insure that written notice is given as provided in §511.29, F.S., and that the provisions of §511.05, F.S., are fully complied with in suspending or revoking the licenses of any establishment that violates the intent of the regulation.

February 4, 1954.—054-27.

HOTELS AND MOTELS—GUESTS—REGISTRATION REQUIREMENTS

QUESTION: Does the Hotel and Restaurant Commissioner of the State of Florida have authority to promulgate regulations which require that each hotel and motel guest be registered at such hotel or motel desk or office before such guest is offered accommodations?

To: Honorable Joe H. Adams, Hotel and Restaurant Commissioner, Tallahassee, Florida:

Section 509.03, F.S., 1953, provides that the Hotel and Restaurant Commissioner shall carry out all laws relating to the inspection or regulation of hotels, apartment houses, rooming houses, or restaurants. Section 509.04, gives him the authority to make all rules and regulations necessary to carry out the true intent of the law.

Section 511.45, F.S., authorizes the Commissioner to suspend or revoke licenses where there have been violations of the provisions of said section regarding advertising of room rates, including nature of rooms as to single or multiple occupancy, number available and dates or periods of time such rates are available. Section 511.051, F.S., 1953, gives the Hotel and Restaurant Commissioner the power to revoke the license issued to any hotel, apartment house, rooming house or restaurant when a person having control thereof leases space in the building for gambling purposes. Section 511.13, F.S., requires that every establishment under the jurisdiction of the Hotel and Restaurant Commissioner "shall be conducted in every department with strict regard to health, comfort and safety of the guests or tenants." Other sections of the law governing the subject matter prescribe further specific authority in the Hotel Commissioner.

In carrying out the provisions of these and other laws of similar nature, and in conducting inspections to determine whether these laws are being complied with, it would appear necessary that the Commissioner or his deputies be advised during such inspections and at other times whether particular rooms were occupied and in some instances, by whom they were occupied and for what period of time. Since this could not be readily accomplished, as it would have to be if an unannounced inspection were being conducted, without reference to a register showing the names of the

guests who occupied the accommodations on certain dates, or who might presently occupy the accommodations, it is reasonably necessary that the Commissioner have access to such a register. There would reasonably appear to be a number of instances wherein identification of guests of such establishments would be of material benefit to the Commissioner in properly carrying out his statutory duties and in addition providing a means for safeguarding and protecting the public generally.

Since some hotels and rooming houses do not keep such registers, and since such registers are necessary to the efficient accomplishment of the duties of the Commissioner, he may promulgate regulations requiring that each licensed hotel or rooming house keep a register showing the names and addresses of its guests, the date that they became guests, and the date that they surrendered the accommodations assigned to them. The Commissioner may reasonably require that the rooming house or hotel secure the signature on the register of each person who contracts for accommodations. He may also require the establishment to obtain from the person signing the register the names of other guests who will share the accommodations with him, and the establishment may be required to keep the register for a reasonable period of time after the guests have departed.

In the light of the foregoing observation we think the question should be answered in the affirmative.

HOTELS, RESTAURANT AND DINING CARS; REGULATIONS

August 2, 1954.—054-181.

REVERSED AND WITHDRAWN—OPINION NO. 049-394 ROOSEVELT APARTMENTS—APPLICATION OF DEFINITION OF APARTMENT HOUSE

QUESTION: Do the 22 individual units of a housing project known as Roosevelt Apartments come within the definition of "apartment house" appearing in §511.01(2), F.S., when such units consist of four to eighteen residences which have separate entrances, which are joined by common walls, which are under one continuous roof, and which are so joined structurally and from outside appearance as to constitute one building?

To: Honorable Joe H. Adams, Hotel and Restaurant Commissioner, Tallahassee, Florida:

The units were further described in opinion 049-394 as consisting of a number of residences, each with a lower and upper floor, each with its own chimney and heating facilities, and each with nothing in common to the other except a common wall. It was also pointed out in the previous opinion that each residence could be sold separately and that the Federal Housing Administration had agreed to accept separate mortgages on any of such residences in any of the units. (It should be noted in this regard that if one

of the residences is sold, the Hotel and Restaurant Commission would have no jurisdiction over it.) Section 511.01(2), is as follows:

"Any building or part thereof, where separate accommodations for more than two families living independently of each other are supplied to transient or permanent guests or tenants, shall for the purpose of this chapter be deemed an apartment house, and upon proper application, the hotel commissioner shall issue to such above described business a license to conduct an apartment house."

The previous opinion on this subject excluded the units under discussion from the above definition on the grounds that each unit consisted of so-called row houses, which were actually separate buildings with common walls. Now, having fully considered the matter again, it is evident that our previous opinion was not based on a full knowledge of the nature of the buildings in question. Photographs and plans of the buildings indicate that each unit is a single building and not a series of connected buildings.

It is still our impression that a series of row-houses, as we understood the term when the previous opinion was written, and as we still understand it, is not within the definition of an apartment house. However, a series of row-houses can escape the definition only if they are in point of fact separate buildings; separate structurally and separate in the sense that the layman would be able to recognize them as such. According to the photographs of the units in question, they are nothing more than long, two-story buildings with a number of entrances. They are, architecturally, the type of apartment buildings with which we are most familiar in this state and they do not correspond to the idea of a row-house which one receives so definitely when visiting certain of our northern cities. The fact that a residence unit, a single apartment, can be sold separately does not in our opinion mitigate against the indisputable fact that such a unit is part of a larger building, that there is a continuous outer wall, a continuous roof and a continuous foundation, embracing it and the similar adjoining apartments.

In view of these considerations, it is necessary to reverse our decision in regard to the Roosevelt Apartments, and Opinion 049-394 is hereby withdrawn to the extent that it conflicts with the statements made herein. It is regrettable that this action is necessary, but it is now evident that we were not fully advised of the facts concerning the Roosevelt Apartments and that our Opinion 049-394, because it was not based on a complete understanding of the situation, was in error in so far as the Roosevelt Apartments are concerned, and any others that are similarly constructed.

Therefore, the question, as set forth herein, is answered in the affirmative.

May 4, 1954.—054-108.

**HOTELS AND RESTAURANTS—PUBLIC TOILETS—USE OF
COIN-OPERATED LOCKS—REQUIREMENTS**

QUESTION: Is it proper for hotels and restaurants to install pay locks on all public toilets maintained by them in accordance with §511.15 and 511.17, F.S.?

To: Honorable Joe Adams, Hotel and Restaurant Commissioner:

Section 511.15, F.S., requires hotels and restaurants "to be equipped with suitable water closets for the accommodation of its guests." Section 511.17 requires such places to maintain "a public wash room for each sex, . . . of easy access to patrons."

Water closets, generally understood to be toilets, and public wash rooms are by these sections required to be maintained for the accommodation of hotel and restaurant guests or patrons. Avoiding the arguments which can be made for the proposition that such toilets are for the free use of the public in general, it is apparent, from a very practical point of view, that they would in some situations be of little convenience even to a paying guest or patron who happened not to have a coin of proper dimensions. It is understood that the maintenance of sanitary conditions in a public toilet might be facilitated to some degree by the use of coin operated locks on the doors to the water closets, but it would seem necessary that some accommodation was intended by these laws to be provided for a guest regardless of whether he might have the correct change for the operation of a pay lock.

In view of these considerations, it is my opinion that the Hotel and Restaurant Commissioner could promulgate an appropriate regulation prohibiting the use of coin operated locks on all of the water closets maintained in compliance with §§511.15 and 511.17, F.S. A reasonable fraction of the number of closets made available should be maintained without locks, but there does not seem to be any prohibition against the use of the locks on the remaining accommodations, provided the establishment installing them can show that they will make the accommodations more agreeable to its guests and that they are not installed purely for the purpose of limiting the convenience of the facilities.

October 2, 1953.—053-258.

**HOTEL AND RESTAURANT COMMISSIONER—
INVESTIGATIONS—ADVERTISED ROOM RATES
—LICENSE REVOCATIONS**

QUESTIONS: 1. When a published advertisement, which quotes the rates at which accommodations are offered by a hotel, apartment house, rooming house, motor court, or trailer camp, is within the requirements of §511.45, F.S., does the Hotel and Restaurant Commissioner have any authority to investigate the records of such an establishment to determine whether it is actually offering its accommodations at the advertised rates and to suspend or re-

voke the licenses of such an establishment when the advertised rates are false or misleading?

2. If not, what action can the Commissioner take against the operator of the establishment when he persists in publishing rate advertisements that deceive the public into seeking accommodations at his establishment?

To: Honorable Mack Humphrey, Commissioner, Hotel and Restaurant Commission:

Section 511.45(1), F.S., makes it a misdemeanor for the operator of a hotel, apartment house, rooming house, motor court, tourist camp or trailer camp to publish any advertisement containing a statement as to the room rates offered at such an establishment, "unless such advertisement shall with equal prominence contain additional data relating to such room rates in the following particulars; (a) whether the rate advertised is for single or multiple occupancy of the room; (b) the number of rooms available in each price level where such advertisement indicates varying rates; and (c) the dates or period of time during which such advertised rates are available." Subsection 3 of §511.45 authorizes the Commissioner to suspend or revoke the license of an operator who violates the provisions of the section.

It will be observed that the above cited statute is concerned exclusively with the contents of published room rate advertisements. If a given advertisement satisfied the requirements of the statute by containing within it the information required by the statute, there is no violation, and the Commissioner has no authority under the statute to suspend or revoke a license.

It can be seen upon examination of the scope of the act that a rate advertisement can be designed which would be legal under this act, but which would allow an operator to misrepresent to a substantial degree the actual rates available at his establishment. The following is an example of an advertisement that meets with the requirements of §511.45:

HOTEL GEORGE

Rooms: \$5.00 Single	\$7.00 Double
Summer Rates	

Such an advertisement complies with requirements (a) and (c) of subsection 1 and does not have to comply with requirement (b) since it indicates that all rooms are rented at the \$5.00-\$7.00 rate. (In this regard see my letter addressed to you on September 8, 1953). Thus, the Commissioner has no authority under the act to take any action in such a situation.

Actually, the proprietor of Hotel George may have only five rooms out of fifty that he rents for the price appearing in his advertisement but he has complied with the statute, and the Commissioner has no authority under it to suspend his license. (If the words "and up", or other words of similar import, had appeared on the sign, indicating varying rates, the sign should have shown

how many rooms were available at each rate. Even though the various rates advertised did not comply with those actually offered by the establishment, the Commissioner would have no authority to conduct an investigation for the purpose of determining such facts and could not revoke the license of the establishment because of such inconsistency.)

As to your second question, reference is made to §817.06, F.S. Without offering any unsolicited advice to those law enforcement officers whose duty it is to enforce the provisions of this statute it is commented that the Commissioner has the same right as any individual to bring to the attention of the proper authority any activity that seems to constitute a violation of this law. Whether any action is taken by a prosecuting official on the basis of the Commissioner's complaint, would depend upon the prosecutor's interpretation of this law. The Hotel and Restaurant Commissioner would have no more authority to conduct any sort of investigation into the records of an establishment for the purpose of discovering whether there had been a violation of this law than would any private citizen; but the Commissioner, through his contact with the industry and through his periodic inspections, would have ample opportunity to discover those establishments that have reputations indicating a policy of fraudulent or misleading advertisement.

On the basis of these considerations it is my opinion that your questions should be answered as follows:

1. Regardless of the fact that an establishment subject to the provisions of §511.45, F.S., is publishing room rate advertisements that are false or misleading because they reflect a rate structure that is substantially different from that which actually prevails at the establishment, the Hotel and Restaurant Commissioner has no authority under §511.45 to conduct an investigation for the purpose of determining this fact or to suspend the license of such an establishment, provided its published advertisements conform to the requirements of §511.45.

2. The Hotel and Restaurant Commissioner may bring to the attention of the proper law enforcement official any false, deceptive or misleading advertisement which constitutes an apparent violation of §817.06, F.S., but he has no authority to conduct investigations for the sole purpose of determining whether there are such violations.

October 9, 1953.—053-264.

HOTEL AND RESTAURANT COMMISSION—LICENSES— ARCHITECT'S PERMITS—HAVEN OF GRACE, HOME FOR NEEDY AGED PERSONS—REQUIREMENTS

QUESTIONS: 1. Should an establishment be required to secure a license from the Hotel and Restaurant Commission when it offers a permanent home to aged or needy members of the Hebrew Christian Alliance of America, the expenses of the establishment being borne partially by contributions and partially by the residents?

2. If such an establishment should be licensed, is it necessary that it secure a building permit from one of the supervising architects of the commission before erecting additional accommodations?

To: Honorable Mack Humphrey, Commissioner, State Hotel and Restaurant Commission:

The establishment in question is known as the Haven of Grace and is located near Brooksville, Florida. It is not known whether it is incorporated, but it is assumed that it is a non-profit organization. Apparently, the lodging facilities are presently composed of several one unit cottages and a "lodge" of unknown capacity. Additional buildings are proposed.

Since there is no building with ten or more rooms and an attached dining room, the establishment would not have to be licensed as a hotel, as such is defined in §511.01(1), F.S. None of the proposed buildings, according to a brochure published by Haven of Grace, would require such a license.

Since the accommodations are not available to the general public and are reserved for members of the Hebrew Christian Alliance of America, none of the present buildings and none of the proposed buildings would come within the meaning of the definition of a rooming house, as found in §511.01(3), F.S.

Since no single building operated by Haven of Grace, or proposed to be operated by such establishment, offers separate accommodations for more than two families living independently of each other, it would not be necessary for any building to be licensed as an apartment house, as such is defined in §511.01(2), F.S.

Since none of the present or proposed buildings seem to come within the definition of hotels, apartment houses, or rooming houses, neither the remodeling of the present buildings nor the erection of the proposed buildings would require the approval of a supervising architect of the hotel and restaurant commission under §511.23, F.S.

An eating place maintained by the Haven of Grace would not be required to secure a license as a restaurant under §511.02, F.S., since it is not advertised or held out to the public to be a place where meals are prepared and served. For the same reason the plans of a proposed building, housing a dining room and kitchen, would not have to be approved by a supervising architect. A more strict construction of §511.02 would result in the dining room of a private home being classified as a restaurant.

More specifically, it is my opinion that your questions should be answered as follows:

1. When an establishment such as the Haven of Grace offers its accommodations or serves meals exclusively to the members of a particular group as distinguished from the public in general, its accommodations can not be classified as a hotel or rooming house and its dining room can not be considered a restaurant within the statutory definition. If the residents at the Haven of Grace can

be described as tenants, and if there is a building among those at the establishment that comes within the definition of an apartment house, such building should be licensed as an apartment house by the hotel and restaurant commission. (It will be observed that §511.01(2), does not require that apartment house accommodations be available to the general public.)

2. Since the buildings proposed to be erected by Haven of Grace do not appear to come within the statutory definition of hotels, rooming houses, or restaurants, the plans of such proposed buildings would not require the approval of a supervising architect of the hotel and restaurant commission. If the establishment should propose the erection of a building that could be classified as an apartment house the architect's approval would be necessary.

October 20, 1953.—053-282.

ROOMING HOUSE—NURSING HOME—COMPARISON AND DISTINCTION

QUESTION: When does an ordinary rooming house, some of whose guests are of advanced age, but not requiring nursing care, become a nursing home as defined in Ch. 28140, Laws of Florida?

To: *Honorable Mack Humphrey, Commissioner, State Hotel and Restaurant Commission:*

The definition referred to in your question is as follows:

"'Nursing home' or 'home' means a private home, institution, building, residence, or other place, whether operated for profit or not, including those places operated by a county or municipality, which undertakes through its ownership or management to provide for a period exceeding twenty-four (24) hours, maintenance, personal care, or nursing for three (3) or more persons not related by blood or marriage to the operator, who by reason of illness or physical infirmity or advanced age are unable to care for themselves, provided that no institution which offers its services primarily for medical treatment or surgery shall be subject to the terms of this Act."

The term "rooming house" is defined in §511.01, F.S., as follows:

"Every house, boat, vehicle, motor court, trailer court or other structure or any place or location kept, used, maintained, advertised or held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall for the purpose of this chapter be deemed a rooming house, and upon proper application, the hotel commissioner shall issue to such above described business a license to conduct a rooming house."

On the basis of these statutory provisions it is my opinion

that a "rooming house" does not become a "nursing home" until its management undertakes to provide maintenance, personal care, or nursing for more than two persons who, by reason of illness, physical infirmity, or advanced age, are unable to care for themselves. Ordinarily a rooming house operator would not provide his elderly guests with the care and attention necessary to bring his establishment within the definition expressed in Ch. 28140, Laws of 1953, and enlarged upon by the regulations of the Florida State Board of Health. The distinction to be observed is that between the caring for the room of a guest in a rooming house and the caring for the person, in addition to the room, where a nursing home is involved. Although the care given a patient or inmate of a nursing home may be no more than that entailed in observing diet and sleeping habits and maintaining a watchfulness over general health and wellbeing, this is substantially more attention than is due or given an elderly guest or tenant of a rooming house.

August 20, 1953.—053-209.

HOTEL AND RESTAURANT COMMISSIONER—DEPUTIES—
APPOINTMENT—STATE BOARD OF HEALTH
EMPLOYEES ELIGIBLE

QUESTIONS: 1. In conjunction with a joint effort of the Hotel and Restaurant Commissioner and the State Board of Health to avoid duplication of inspections which are similar in nature, may the Hotel and Restaurant Commissioner appoint as deputy hotel and restaurant commissioners, without compensation, certain of the employees of the State Board of Health whose duties require them to inspect the same facilities that are required to be inspected by the Commissioner?

2. May the Hotel and Restaurant Commissioner inspect, or cause to be inspected, at the request of the State Board of Health an established nursing home coming under the provisions of Ch. 28140, Laws of Florida, Acts of 1953, in an effort to determine if said home is free from fire hazards?

To: Honorable Mack Humphrey, Hotel and Restaurant Commissioner:

It is ordinarily considered that, if a statute imposes a duty upon a public officer to accomplish a stated governmental purpose, it also confers, by implication, every particular power necessary or proper for the complete exercise or performance of the duty so long as that power is not in violation of law or public policy. (In Re Advisory Opinion to the Governor, 60 So. 2d 285.)

It has been said that "as an abstract proposition, statutory authority is not necessary to enable a public official to appoint sufficient deputies to perform the duties of his office..." (43 Am. Jur. 219). A deputy is more than a mere employee; he has the authority to perform all of the ministerial acts that his principal may perform except those that must be performed by the principal in person (67 C. J. S. 449). A deputation implies a delegation of authority which is constant and which need not be redefined from time to time as is the case with an employment.

In the process of making inspections of hotels and restaurants and of serving notices of violations, it would appear that the Commissioner's employees should be allowed to act for him as agents or deputies rather than as mere employees whose positions do not entitle them to speak authoritatively for the Commissioner. Since the type of ministerial duty given to the Hotel and Restaurant Commissioner is a type that must largely be delegated to others, since it can best be performed by one whose ministerial authority is coextensive with that of the Commissioner, and since there is no statutory rule prohibiting a public officer from appointing deputies, it must be concluded that the Hotel and Restaurant Commissioner may appoint sufficient deputies to perform the duties imposed upon him by law.

If the Commissioner determines in his discretion that his duties may be more efficiently performed by deputizing employees of the State Board of Health, whose duties are similar to and compatible with those performed by deputy hotel commissioners, if such employees are willing to cooperate in this arrangement without additional compensation, and if the State Board of Health is willing to cooperate in an effort to avoid duplication of state inspection of the same facilities, there is no apparent legal obstacle to the Commissioner's deputizing such employees.

As to the conducting of fire inspection in nursing homes, it is provided in Ch. 28140, Laws of 1953, that the State Board of Health or some agency appointed by it may perform inspections in such homes for the purpose indicated in the act. Deputy hotel and restaurant commissioners, if they are appointed by the State Board of Health to make such inspections, and if they have occasion to be in such homes in connection with the duties of the Hotel and Restaurant Commissioner, may perform such inspections for the State Board of Health and report to the Board concerning the conditions of the homes as the Board may direct.

In regard to the mutual assistance arrangements referred to herein it should be pointed out that neither of the agencies is authorized to incur any expense on behalf of the other. The co-operation between them would be permissible only when one agency can do a part of the work of the other without any additional expense and without deviating substantially from the work which it is required to perform.

It is my opinion that, as conditioned herein, the two questions should be answered affirmatively.

SALE OF SECURITIES

May 4, 1954.—054-109.

SALE OF SECURITIES—FEDERAL MILITARY RESERVATIONS—STATE REGULATIONS.

QUESTION: May the State of Florida through its Securities Commission, under and pursuant to Ch. 517, F.S., regulate the

sale of securities within federal military reservations located in Florida?

To: Florida Securities Commission:

This question presents an issue of state jurisdiction, power and authority over military reservations. Under §8, Art. I, of the Federal Constitution, the Congress of the United States has authority "to exercise exclusive legislation over all places purchased with the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Under §6.02, F.S., (Ch. 25, Laws of Florida, Acts of 1845), the Legislature of Florida gave its consent to the purchase, acquisition, ownership, occupancy and use of lands in this state, by the United States, for forts, magazines, arsenals, dock-yards and other needful buildings; and by §6.04, F.S., authorized and provided for the ceding of state jurisdiction over such lands; subject, however, to the right of the State to enforce criminal and civil process, issued by its courts and judicial officers, upon said lands. The term "exclusive legislation" used in the Federal Constitution is synonymous with "exclusive jurisdiction." (*Arledge v. Mabry*, 52 N. Mex. 303, 197 P. 2d 884; *State v. Blair*, 238 Ala. 377, 191 So. 237). See also 54 Am. Jur. 594-602, Sections 81-88, and 65 C. J. 1255, Section 7.

"When jurisdiction is ceded, the municipal laws of the state, except in so far as they are inconsistent with the laws of the United States, remain in force until abrogated by the United States, but this includes only such laws as are in effect at the time of cession . . ." (65 C. J. 1258, §7; 54 Am. Jur. 597, §84). The above quoted language of §8, Art. I, of the Federal Constitution, "has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however shall be left without a developed legal system for private rights. . . . While exclusive federal jurisdiction attaches, state courts are without power to punish for crimes committed on federal property. This has made necessary the legislation which gives federal courts jurisdiction over these crimes . . ." (*James Stewart & Company v. Sadrakula*, 309 U. S. 94, 60 S. Ct. 431, 84 L. Ed. 596, text 600 and 601). The State of California ceded to the United States exclusive jurisdiction over all the territory included in the Kings Canyon National Park, within which were included certain privately owned lands; it was held that such cession of jurisdiction included such privately owned lands and that the state had no jurisdiction over liquor sales on such lands, such jurisdiction being in the federal government (*Petersen v. United States*, CCA 9th, 191 Fed. 2d 154, *Certiorari denied* 342 U. S. 885, 72 S. Ct. 174, L. Ed. 664).

Unless some federal statute, such as the Federal Securities Exchange Act (Title 15, §§78a, et seq., United States Code), controls the sale of securities upon the military reservation (where cession of jurisdiction has been given by the State), it may be that the Florida sale of securities statutes would be applicable, not as state

but as federal laws to be enforced by the federal authorities and courts. (See 65 C. J. 1258, Section 7; 54 Am. Jur. 597, §84; *James Stewart & Company v. Sadrakula*, supra; *Petersen v. United States*, supra). That is a question of the federal authorities and not the state authorities.

Although contact may be made with personnel upon the military reservation if the sale of securities is consummated off the reservation the state laws might be applicable to such sale.

The above question is answered in the negative, where the State of Florida has ceded jurisdiction over the military reservation to the United States, but in the affirmative where there has been no such cession of jurisdiction.

December 22, 1954—054-271.

FEDERAL NATIONAL MORTGAGE ASSOCIATION—SECURITIES—EXEMPT STATUS UNDER §517.05, F. S.

QUESTION: Are the securities issued by the Federal National Mortgage Association under §303 (Common Stock), 304 (Secondary Market Obligations Notes) and 306 (Management and Liquidating Notes) of the Housing Act of 1954 (Ch. 649, Public Law 560, of the 2nd Session of the 83rd Congress of the United States), exempt securities under §517.05, F. S.?

To: *Florida Securities Commission, Tallahassee:*

Under said §517.05, F. S., "any security issued or guaranteed by the United States" and "any security issued by or representing an interest in or a direct obligation of . . . any corporation created and acting as an instrumentality of the government of the United States pursuant to authority granted by the Congress of the United States . . ." is an exempt security. The above reference to "any security issued or guaranteed by the United States," etc., seems to refer to two classes of securities and not to a single class. If a security is either *issued by* or *guaranteed by* the United States, etc., it would seem to be an exempt security under said §517.05, F. S. It is not necessary that it be both *issued and guaranteed* by the United States, etc., (see *Ballard-Hassett Company v. Miller*, 219 Iowa 1066, 260 N. W. 65).

The Act of July 1, 1948, authorized the establishment by the Housing and Home Finance Administrator, of a Federal National Mortgage Association, which association was established pursuant to the statutes prior to the Federal Housing Act of 1954 (Ch. 649, Public Law 560, of the 2nd session of the 83rd Congress), which enactment amended and revised many sections of the federal statutes relating to housing, including a rewrite of the statutes relating to the said Federal National Mortgage Association (§§1716 et seq., Title 12, United States Code). The said Housing Act of 1954, under "Title III," entitled "Federal National Mortgage Association," declares "that the purposes of this title are to establish in the Federal Government a secondary market facility for home mortgages . . ." The said act further provides that there is "created a body corporate, to be known as the Federal National Mortgage Asso-

ciation' . . . which shall be a constituent agency of the Housing and Home Finance Agency. The Association shall have succession until dissolved by Act of Congress." The said Housing and Home Finance Agency appears to be an agency of the United States (Korman v. Federal Housing Administrator, 72 App. D. C. 245, 113 Fed. 743). The federal statutes expressly exempt from federal, state and local taxation the personal property of the Association; although it gives the state and local taxing units the right to tax the real property of the Association located therein (Title 12, §1719, United States Code); this seems to indicate that the Congress considered the Association as a federal agency. We, therefore, feel that the said Association being a corporation controlled by the United States and an arm or agency of the United States, its securities above mentioned are either securities *issued by the United States* or a direct obligation of a corporation created and acting as an instrumentality of the United States pursuant to authority granted by the Congress, and within the purview of said §517.05, F. S.

The Federal National Mortgage Association is to be distinguished from the "public housing agencies" considered by this office in its opinion of December 15, 1950 (050-563) in that said agencies were found not to be federal agencies or instrumentality and therefore not within the above provisions of §517.05, F. S.

The above question is, therefore, answered in the affirmative; notwithstanding the securities in question are not guaranteed by the United States and do not constitute a debt or obligation of the United States.

May 4, 1954.—054-110.

PENNSYLVANIA TURNPIKE REVENUE BONDS— EXEMPT SECURITIES

QUESTION: Are the Pennsylvania Turnpike Revenue bonds, Series of 1954, exempt securities under §517.05, F.S.

To: *Florida Securities Commission:*

Under Subsection (1), §517.05, F.S., the provisions of our Blue Sky Law (Ch. 517, F.S.), except as may be otherwise expressly provided, does not apply to "any security *issued or guaranteed* by the United States or any territory or insular possession thereof, or by the District of Columbia, *or by any state of the United States* or political subdivision *or agency thereof*." Securities within the purview of said Ch. 517, among other things, relate to "any note, . . . bond, debenture evidence of indebtedness, . . . or other instrument commonly known as a security . . . (§517.02(1), F.S.). In this connection it appears necessary that we construe the phrase "issued or guaranteed" as used in said Subsection (1) of §517.05, F.S. The subsection appears to have been taken verbatim from the uniform act and is identical with the provision of the Iowa statute considered by the Supreme Court of that state in *Ballard-Hassett Company v. Miller*, 219 Iowa 1066, 260 N.W. 65, wherein the word "or" was construed as being used in the disjunctive and that the exemption related to securities issued, guaranteed

or both issued and guaranteed by a state, its subdivision or agency. We find no other case construing the provision.

Such bonds are issued by the Pennsylvania Turnpike Commission, an instrumentality of the Commonwealth of Pennsylvania created by an Act of 1937 and Acts amendatory and supplemental thereto, in connection with the Pennsylvania Turnpike System set up by the Legislature of that state. The legislation mentioned contains the express provision that all revenue bonds issued thereunder shall not be deemed a debt of the Commonwealth or a pledge of its full faith and credit, and that the Commonwealth is not directly, indirectly or contingently obligated to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment. The revenue bonds are payable solely from the revenue derived from tolls, from contracts providing for gasoline stations, hotels, restaurants and other concessions in the right-of-way, and from any other revenue, all as may be provided in any indenture under which such revenue bonds may be issued. When all revenue bonds are paid off, or their retirement amply provided for, the turnpikes become a part of the Commonwealth's public highway system. The Pennsylvania Turnpike Commission consists of five members, one being the Secretary of Highways of the Commonwealth as an ex officio member, and four appointed by the Governor and approved by the State Senate. The Commission is given power of eminent domain. Under the Statutes the Pennsylvania Department of Highways must approve all contracts and agreements relating to the Commission's highway construction, tunnels, bridges, etc. These observations show that the Pennsylvania Turnpike Commission is an agency of the State of Pennsylvania.

Pennsylvania Turnpike Bonds, Series of 1954, appear to be "securities" within the intention and purview of Subsection (1), §517.02, F.S., issued by an agency of the State of Pennsylvania within the intention and purview of Subsection (1), §517.05, F.S., and therefore exempt securities within said §517.05, F.S. In the light of *Ballard-Hassett Company v. Miller*, supra, we hold that said Subsection (1), §517.05, F.S., relates to securities which are either issued or guaranteed, and that both issuance and guarantee are not required by said subsection.

The above question is answered in the affirmative.

December 4, 1953.—053-319.

**SALE OF SECURITIES—INVESTMENT COMPANIES—
ISSUANCE—CONDITIONS—CH. 517, F.S.**

QUESTIONS: 1. May the Florida Securities Commission by rule or regulation require that an investment company be possessed of liquid assets before it may qualify its securities for sale in Florida with the said securities commission?

2. If the above question is answered in the affirmative then what limitations may be placed upon the amount of liquid assets to be so possessed?

To: Florida Securities Commission:

The purpose of the statutes of this state regulating the sale of securities in this State (Ch. 517, F.S.) is to protect the investor in securities, not against loss from a fluctuating market, but from any fraud that might be practiced upon him (State v. Atlantic Title Company, 118 Fla. 402, 158 So. 888; State v. Knott, 119 Fla. 515, 160 So. 670; Nichols v. Yandre, Fla. 9 So. 2d 157). The purpose of such statutes generally "is to protect the public generally, and particularly investors, from dishonesty and irresponsibility in the disposal of securities, and to prevent, as far as possible, the sale of fraudulent and worthless corporate and quasi-corporate stocks and securities..." (53 C. J. S. 735, §72). Such statutes are essentially remedial in nature and should be liberally construed in order to effectuate their purpose (53 C. J. S. 740, §72). Although certain securities are exempt from the operation of our securities statutes (§517.06, F.S.), other securities are required to be registered, either by notification (§517.08, F.S.) or by qualification (§517.09, F.S.). These statutes contain numerous requirements as to evidence of the ability of the issuer of securities to meet the obligations created by their issuance.

Where securities are secured by mortgage on real property there are requirements as to the ratio of the value of the real property mortgaged to the amount of securities issued; where secured by a pledge of collateral there are rules and regulations as to such collateral; numerous and divers items of information concerning the securities and the ability of the issuer to meet them at maturity are required by the statutes (see §§517.08 and 517.09, F.S.). The powers of securities commissions generally are broad in protecting the purchasing public from fraud, both actual and constructive, in connection with the sale of securities (see 53 C. J. S. 744 et seq., §73). Although the commission could not require that an investment company be possessed of an unnecessary amount of assets, we feel that it is within its power to require that such company be possessed of sufficient assets so that the securities issued and sold by it would not amount to a constructive fraud upon the public. We, therefore, feel that the first above question should be answered in the affirmative.

There is no statute in this state fixing the amount of liquid assets which an investment company must be possessed of as a condition to the issuance and sale by it of investment securities; this being true the answer to the question seems to be a practical and not a legal one to be determined by the commission from facts and circumstances before or available to it; and maybe after a full hearing of the matter before it. Under the Federal Investment Companies Act (Title 15, §§80a-1, et seq., United States Code) investment companies must have "a net worth of at least \$100,000." Whether this amount or some lesser or larger amount should be required in this state is within the discretion of the commission. It may be that each company making application should be considered by the commission as a separate entity and its requirements fixed from the facts and circumstances peculiar to it. No definite answer to the second question seems possible as applied to all companies.

October 20, 1953.—053-281.

EXEMPT SECURITIES—DOMESTIC AIRLINES

QUESTION: Are the securities issued by a domestic airline, doing an interstate business but no foreign business, of this country entitled to the exemption provided by §517.05(4), F.S.?

To: *Florida Securities Commission, CAPITOL:*

Under said subsection (4), §517.05, F.S., "any security issued or guaranteed, either as to principal, interest or dividend, by a corporation owning or operating a . . . public utility service" is exempt from regulation under Ch. 517, F.S., when subject "to regulation or supervision, *either as to rates and charges* or as to issue of its own securities, by a public commission, board or officer of the government of the United States, or any state . . ."

Domestic airlines or air carriers operating in the United States are subject to certain regulation under the Civil Aeronautics Act of the United States (§§401 et seq., Title 49, United States Code). Under this statute the rates and charges made and to be made by air carriers within the United States, for the transportation of persons and property are regulated by §§483, 484, 485, 486 and 642, Title 49, of the United States Code. There is a distinction to be drawn between air carriers doing an interstate business but no foreign business, and a foreign carrier doing a foreign and interstate business partly within the United States and partly without the United States (as was considered in the opinion of this office on October 20, 1947, 1947-8 Biennial Report, page 481). The first type of such carriers is regulated as to its rates and charges by the Statutes of the United States; while the second type is regulated in part only by the Statutes of the United States, with its rates and charges for carriage in foreign countries regulated, if at all, by the statutes and laws of those countries.

The rates and charges of domestic airlines, doing an interstate business but no foreign business, being regulated by the Civil Aeronautics Act of the United States, above mentioned, it would seem to be within the purview of Subsection (4) of §517.05, F.S., and the above question is answered in the affirmative.

December 3, 1953.—053-317.

FLORIDA CORPORATIONS—SALE OF SECURITIES TO NONRESIDENTS—REGISTRATION.

QUESTIONS: 1. When an issuer is a Florida corporation and issues its securities and has a transfer agent in the State of Florida, but no securities are sold within the state, is it necessary that the securities in question, which are going to be sold in other states to nonresidents of this state, be registered under the provisions of Ch. 517, F.S.?

2. Under the circumstances related in question 1, is it necessary that the issuer register as a dealer to sell its securities in another state as aforesaid?

To: *Florida Securities Commission:*

Chapter 517, F.S., was derived from Ch. 14899, Laws of Florida, Acts of 1931 as subsequently amended, which act was entitled "*an act regulating the sale of securities and making uniform the law relating thereto...*" This act repealed Sections 4065-4073, Revised General Statutes, 1920, which was derived from Chapter 6422, Laws of Florida, Acts of 1913, which provided "conditions and terms under which corporations, foreign and domestic, *can sell to persons in Florida* stock and other securities..." "Unless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter or history, no legislation is presumed to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it and it is generally so construed. An extraterritorial effect is not to be given statutes by implication..." (50 Am. Jur. 510, §487). "Obviously the statute (Ch. 517, F.S.) was designed by the legislature to protect the investor in securities, not against losses from a fluctuating market, but from fraud that might be practiced upon him." (Nichols v. Yandre, Fla., 9 So. 2d 157, text 159). The purpose of statutes regulating the sale of securities "is to protect the public generally, and particularly investors, from dishonesty and irresponsibility in the disposal of securities, and to prevent, as far as possible, the sale of fraudulent and worthless corporate or quasi-corporate stocks and securities. They are not intended primarily to benefit sellers, brokers or owners of securities; and, although they regulate the sale of securities, it is not their purpose to regulate the ordinary business of corporations." (53 C. J. S. 735, §72). It seems clear that the Florida Statute relates only to sales of securities within this state and not to sales of securities in other states, and that they do not attempt to regulate the ordinary business of corporations in this state.

"Unless registration of transfers on the books of the corporation is expressly required by some provision of the corporate charter, or of a general law, or by a valid by-law, a bona fide transfer without such registration, either by way of sale or pledge, passes the legal title to stock as against all the world..." (13 Am. Jur. 425, §352). Unless there be some statute, charter or by-law requirement making the sale of stock or securities effective only upon a formal transfer required to be made in this state, so that there may not legally be a sale and transfer in another state, we see no application of Ch. 517, F.S., to sales of securities, although issued by corporations of this state, in other states. The statutes of the state where the sale is made and not Ch. 517, F.S., apply.

As used in Ch. 517, F.S., the term "dealer" includes "every person, other than a salesman, who *in this state* engages for all or a part of his time directly or through an agent in the business" of selling securities within the purview of Ch. 517, (§517.02(4), F.S.) Sales of securities in another state by a resident of this state would not seem to be within the contemplation of the statutes.

Both of the above stated questions are answered in the negative.

July 10, 1953.—053-147.

FLORIDA SECURITIES COMMISSION—CERTIFICATES OF
CAPITAL STOCK HELD IN ESCROW—TAXABILITY

QUESTION: "Are certificates of capital stock which are held in escrow by the Florida Securities Commission under the provisions of §517.18, F.S., taxable as intangible personal property and if so by what process the value of such intangible personal property is determinable for the purpose of taxation?"

To: *Honorable C. M. Gay, State Comptroller:*

Section 517.18 requires that under certain circumstances shares of stock registered under the Uniform Sale of Securities Law shall be placed in escrow with the Securities Commission under agreement that the owners of such securities shall not be entitled to withdraw them from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend or dividends aggregating not less than 6% upon the value thereof, shown to the satisfaction of the Commission to have been actually earned on the investment in any common stock so held.

The intangible personal property tax statute imposes upon intangible personal property a tax assessable against the owner thereof to be computed upon the true cash value of the said intangible on the 1st day of January of each tax year. The tax is imposed upon the owner of the property or upon any person occupying a position of trust created by the owner, whether voluntary or by operation of law.

The law requires every person, whether owner, custodian, trustee, fiduciary, or otherwise, to make return of intangible personal property for the purpose of taxation annually. The tax is imposed upon the intangible personal property regardless of where its situs may be or where or under what conditions or circumstances it may be held.

The fact that certain shares of capital stock which are unquestionably classified as intangible personal property may be held in escrow by some person other than the owner thereof, whether through voluntary action or by operation of law, does not in anywise affect the character of the intangible as property subject to taxation. The fact that the actual owner does not exercise any control over the property does not affect its character as property subject to taxation. The law requires that the property shall be assessed and the tax computed upon the true cash value of the property. The duty is imposed upon the Tax Assessor in the first instance to determine what is the true cash value of the property for the purpose of taxation. In reaching such determination he may take into consideration the value at which such stock is listed upon a recognized stock exchange on the 1st day of the tax year or the day preceding that date. He may arrive at the true cash value of the property as based upon its par value as expressed in the shares, or in the absence of such evidence of value he may from such information as may be at his command determine the value

from transactions recently had in the exchange of such stock, or he may arrive at a value based upon the book value or the actual intrinsic value as reflected by the corporate assets as compared to the amount of capital stock outstanding. He is not confined to any one of these particular measures of value, his statutory duty being to determine the value from such information as may be at his command.

In summary, the subject securities are taxable as intangible personal property. The value decided upon as a basis for the computation of the tax should be determined in the manner indicated.

May 8, 1953.—053-95.

SECURITY—COMBINATION OF AGREEMENTS—CH. 517, F.S.

QUESTIONS: 1. Where a corporation doing business in this state offers to sell certain aluminum display stands to persons, firms and corporations in this state, for a consideration equal to fifteen dollars for each such stand purchased, and at the same time offers to lease such stands from the purchaser at and for a consideration of three dollars per annum for a period of five years and purchase them at the end of such five years at and for the sum of fifteen dollars each, is such agreement or combination of agreements a security within the purview of Chapter 517, F.S.?

2. Where the same corporation also offers to grant to persons, firms or corporations, at and for the consideration of six thousand dollars, the right to handle and sell its products within a certain described area within the United States, and at the same time agrees to lease the said franchise from the said purchaser, at and for the sum of one thousand dollars per annum, for an indefinite period of time, with the further right to terminate the said lease, after six months notice, upon the payment of six thousand dollars, are such agreements or combination of agreements within the purview of said Ch. 517, F.S.?

To: Florida Securities Commission, Capitol:

There is attached to your said request for opinion copies of the above mentioned proposed agreements, leases, etc., together with copy of ad appearing in one of the newspapers of the State through which the offers mentioned in the above questions were presented to the public in this State. There is also attached a copy of a letter from the corporation in question to a person answering the said newspaper ad in which the following appears:

"Several months ago, we started in the super markets with our own Display Stands, and have found that this vastly increases the sale of our merchandise. We are financially sound and have the highest rating in Dun & Bradstreet that we can get for our capitalization. However, if we take surplus money, we can expand into the super markets faster than our normal profits will allow us to do. As we can turn over \$6,000 in approximately 60 days and make better than \$2,000 on the money, we can well afford to pay 2% annual interest."

And a copy of a letter from the said corporation to the purchaser of franchise rights in certain areas in Massachusetts and Maryland, purchased for the consideration of six thousand dollars, in which the corporation states as follows:

"Also attached is a lease Agreement, in which you agree to lease us the right to distribute in these two territories. No termination date has been set for the lease of these territories, but on Six Months' notice, you may require us to purchase the franchise for the territories from you for Six Thousand (\$6,000.00) Dollars in cash, and on Six Months' notice, we may, at our option, purchase the franchise from you for Six Thousand (\$6,000.00) Dollars."

These observations and statements seem to set out the material promises and agreements of the said corporation in connection with the questions above.

Under Ch. 517, F.S., a security is defined as including an "evidence of indebtedness, certificate of interest or participation, ... certificate of interest in a profit-sharing agreement, or the right to participate therein, ... investment contract, or beneficial interest in title to property, profits or earnings, interest in or under a profit sharing or participation agreement or scheme, or any other instrument commonly known as a security..." (subsection (1) §517.02, F.S.). Although the following statement was taken from *Securities and Exchange Commission v. W. J. Howey Company*, 328 U. S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, text 1249, where the statutory definition in the Federal Securities Act was under consideration, the definition in the Florida act is so similar in many respects as to make the following language of the Federal Court applicable to the Florida statutes by analogy, to wit:

"The term 'investment contract' is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state 'blue sky' laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment.' *State v. Gopher Tire & Rubber Co.* 146 Minn. 52, 56, 177 N.W. 937, 938. This definition of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves.

"By including an investment contract within the scope of §2(1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress,

especially since such a definition is consistent with the statutory aims."

The following extracts taken from pages 318, 319 and 320, of a recent work by Louis Loss on "Securities Regulation" (copyrighted in 1951) seem to bear upon the questions before us, to wit:

"A great many other schemes—many of them of the Alice in Wonderland variety—have been brought under both federal and state umbrellas by this same process of looking through form to substance. If 'certificate of interest or participation in any profit-sharing agreement' won't do for any reason, perhaps because there is no 'certificate,' 'investment contract' furnishes the needed reinforcement. As we have seen, a writing is not essential for either an 'investment contract' or a 'transferable share' or an 'interest * * * commonly known as a "security"'. "

"(ii) Purported Sales or Leases of Property with Management Arrangements: Other schemes which have been held with almost monotonous consistency to involve 'investment contracts' and similar 'securities' are based on a purported sale or lease of some form of tangible property subject to an arrangement whereby the seller retains possession and control of the property with a view to earning a profit for the nominal owners or lessees. The catalog of these schemes is as variegated as the imaginations of promoters. Many of them involve animals, preferably of either a fecund or a fur-bearing variety. A person 'sells' pairs of silver foxes, for example, with the idea that he will supply the expert care (for a charge, of course) and in due time nature will supply lots of pups—, one is tempted to say 'a true stock dividend.' Other promoters' tastes have run to shares in fishing boats, vending machines and parking meters, cemetery lots (which are sold in sufficient quantities to provide for the buyers' interment unto the third and fourth generation), and such other types of real estate as tung trees, vineyards, fig orchards, and farm land to be paid for with crops raised by the vendor.

"The line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no 'investment contract' is involved where a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, so long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others."

Although the application of the Florida Securities Statutes (Ch. 517, F.S.) to the circumstances set out in the two questions hereinabove posed is not easy of determination, we are inclined to the view that there is a good probability that such contracts are

subject to regulation under said statutes and should be so considered by the commission until the question is finally settled by the courts. We, therefore, answer both of the above questions in the affirmative.

SALE OF LIQUID FUELS

February 2, 1953.—053-21.

LIQUEFIED PETROLEUM GAS—APPLIANCES— EQUIPMENT—DISTRIBUTORS—DEALER'S LICENSES—CH. 526, F.S.

QUESTION: Are those firms in Florida which are wholesale distributors of appliances and equipment for use of liquefied petroleum gas and which sell such appliances and equipment only to retail appliance and equipment dealers or liquefied petroleum gas dealers for resale to the ultimate consumer, required to be licensed as dealers in appliances for use of liquefied petroleum gas under the provisions of §§526.12-526.20, F.S.?

To: Honorable J. Edwin Larson, State Fire Marshal:

The request for opinion states that certain of these firms are manufacturing such appliances and equipment within this state, but that a majority thereof are domiciled without the state and appoint a distributor under a franchise or contract basis.

Attention is directed to certain definitions set forth in §526.12.

Subsection (4) thereof defines a dealer in appliances for use of such gas as, "Any person selling or offering to sell, leasing or offering to lease, the apparatus, appliances and equipment necessary for the storage and/or converting of liquefied petroleum gas into flame for light, heat and power."

Subsection (6) thereof defines "installation" as, "The act of installing apparatus, appliances and equipment necessary for storing and/or converting liquefied petroleum gas into flame for light, heat and power for use by the ultimate consumer."

Subsection (7) thereof defines appliances and apparatus for use of ultimate consumer as, "The apparatus, appliances and equipment described in and contemplated by immediately preceding subsection (6)."

Subsection (8) thereof defines a manufacturer of appliances and equipment for the use of liquefied petroleum gas as, "Any person manufacturing and offering for sale or selling in this state tanks, bottles or other containers and necessary appurtenances thereof for use by dealers in liquefied petroleum gas in their storage, transportation or delivery of such gas to ultimate consumers thereof; and apparatus, appliances and equipment for use by the ultimate consumer for storing and converting liquefied petroleum gas into flame for light, heat and power."

It is to be noted that above-quoted subsection (4), defining a

dealer in apparatus for use of liquefied petroleum gas, does not by its wording specifically provide that wholesale dealers in such equipment are not covered by the definition; however, that would appear to be the reasonable construction of the subsection. This construction appears to be supported by the definition of a manufacturer of appliances and equipment for use of liquefied petroleum gas found in subsection (8) above.

In view of the definitions mentioned, in my opinion the question is answered as follows:

Those persons, as contemplated by the definition of "person" in §526.12(2), engaged in this state in the business of manufacturing and offering for sale or selling in this state the apparatus and appliances contemplated by §526.12(8) for use by dealers in liquefied petroleum gas to the extent set forth in the subsection, and who manufacture and offer for sale and sell in this state such apparatus and equipment for use by the ultimate consumer, are required to pay the license tax provided for such manufacturers under §526.13, whether they sell directly to dealers or to ultimate consumers.

On the other hand, where such persons manufacture such appliances and equipment in other states and engage in the wholesale distribution thereof in this state through distributors thereof to dealers in such appliances and equipment, as defined in §526.12(4), or to dealers in liquefied petroleum gas, *for sale by them in this state to ultimate consumers*, such manufacturers and wholesale distributors, under a reasonable construction of the definitions here discussed, are not required to be licensed as dealers in such appliances and equipment, within the purview of §§526.12-526.20, F.S.

DOG RACING AND HORSE RACING

January 29, 1954.—054-20.

STATE RACING COMMISSION—PERSONS CONVICTED OF FELONY—BOOKMAKERS—EMPLOYMENT OF

QUESTION: Does the Florida State Racing Commission have any discretion to take into consideration mitigating circumstances in allowing continued employment in connection with racing wherein the fingerprint record of a person taken under the terms of §§550.181, F.S., shows that said person coming within the terms of said statute has been convicted of a felony in the State of Florida or under the laws of another state, government or country of an offense which would be a felony if committed in the State of Florida, or who shall have been convicted of bookmaking in the State of Florida or elsewhere or who is commonly known as a bookmaker or bears the general reputation of being a bookmaker or who knowingly associates regularly with persons commonly known as bookmakers or criminals?

To: Honorable Ray E. Dilg, Chairman, Florida State Racing Commission:

Section 25 of Art. XVI of the Florida Const. provides:

"The term felony, whenever it may occur in this constitution or in the laws of the state, shall be construed to mean any criminal offense punishable with death or imprisonment in the State Penitentiary."

You have furnished me a certificate showing that a named individual was indicted for violating §338, Title 18, U.S.C., and §17(a)(1), 17(a)(3) of the Securities Act of 1933, as amended, and §88, Title 18 U.S.C.; use of the mails to defraud; in the sale of securities by use of the mails, employing a device, scheme and artifice to defraud and conspiracy. Further, that the subject was found guilty by jury of the charges contained in the indictment on December 19, 1938, and was adjudicated guilty by the court and sentenced to be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment in a jail for and during the period of one year.

There is no question but that the crime for which this person was convicted by a jury is a felony under the laws of the United States.

Section 550.181, F.S., which prohibits certain persons from being employed in connection with racing, was enacted under the police power of the State of Florida and in all such enactments there must necessarily be hardships upon some individuals. It is plain in this case that the intent of the legislature is to prohibit persons who have been convicted of felonies from being employed in capacities connected to and with the racing business and jai alai fronton business in Florida.

Our court held in *Fischwenger v. York*, 154 Fla. 450, 18 So. 2d 8, that the practice of dentistry in Florida is not an absolute unqualified or vested right, but is a privilege that may be exercised only in subordination of the police power of the state; that it may be controlled and regulated by the legislature in the exercise of the police power, and that when conflicts occur between the right of a citizen to follow such profession and the right of the state to preserve the general health and welfare, the right of the citizen in the matter must yield to the power of the state to prescribe such reasonable restrictions and regulations as may be necessary to protect the people from ignorance, incapacity, deception or fraud.

We have a statute in this state requiring a person's driver's license to be revoked upon his being found guilty of driving a motor vehicle while intoxicated. In the case of *Bartells v. State*, 156 Fla. 535, 24 So. 2d 40, the court pointed out that the appellant was informed against for driving an automobile while in an intoxicated condition; that the evidence disclosed by the record did not make out a strong case against him, but that there was some testimony which, if believed by the jury, was sufficient to sustain the guilty verdict. It further pointed out that the appellant was a man of 61 years, ran a farm out in the country as well as a business in the city and he needed to visit the farm daily and it did

not appear that he had ever been charged before with an offense such as drunk driving and that the judgment in so far as it revoked his driver's license for twelve months might be rather harsh in the particular case, but that the court was compelled to order the revocation by the language in the statute.

It would appear to me that the language in this statute, 550.181, is clear and needs no construction. Therefore, your question is answered in the negative.

October 13, 1953.—053-267.

**GULFSTREAM RACE TRACK—PERFORMANCE BY SOUTH
BROWARD HIGH SCHOOL BAND—§550.04, F.S.,
APPLICABLE**

QUESTION: May the South Broward High School Band perform at the Gulfstream Race Track if the band leaves the track after the concert and its members are not permitted to participate in gambling?

To: Honorable J. E. Morris, Jr., Attorney Board of Public Education, Broward County, Suite 603 Sweet Building, Fort Lauderdale, Florida:

Section 550.04, F.S., provides, in part:

“...No racing shall be permitted on Sunday, and no minors except jockeys, apprentices, exercise boys and grooms shall be permitted to attend said races or to be employed in any manner by the track.”

In view of the above cited provision of the law, your question is answered in the negative.

April 16, 1954.—054-89.

**DOG OR HORSE TRACK FUNDS—SCHOLARSHIP DAYS—
PAYMENT TO TRUSTEES OF INSTITUTIONS OF
HIGHER LEARNING—HILLSBOROUGH COUNTY**

QUESTION: May a horse track or dog track operator under the provisions of Ch. 28499, Laws of Florida, Acts of 1953, pay money directly to the trustees or other governing body of an institution of higher learning located in the county affected by the act without the necessity of such funds going to the State Treasurer's office as Ex Officio Treasurer of the State Racing Commission?

To: Honorable J. Edwin Larson, Treasurer, State of Florida:

Chapter 28499 is a general law affecting only Hillsborough County and providing in effect that the Racing Commission is authorized to grant an extra day of racing to each horse or dog track located in the county, and that this extra day shall be in addition to any other additional days granted by law on condition that the track owner operator agrees that all profits less actual operating cost from such specific day's operation, including all taxes otherwise payable to the State of Florida, should be paid

to the trustees or other governing body of any institution of higher learning located in the county and having comparable curricula standards for entrance and graduation as is prescribed for state senior universities.

Under this act and under a recent holding of the Supreme Court of Florida in the case of State of Florida ex rel Gulfstream Park Racing Association, Inc., v. Florida State Racing Commission, decided November 17, 1953, petition for rehearing denied December 11, 1953, where the court specifically held that the profits which accrue from the so-called charity days under the provisions of §550.03 and scholarship days under the provisions of §550.08 are not a tax as that term is currently employed and therefore is not money that is due and owing the State of Florida but is merely a matter of contract between a racing permit holder and a charitable organization or university as in this case, it is my opinion that these funds should be paid by the dog or horse track operator directly to the trustees or other governing body of any institution of higher learning in the county.

May 13, 1953.—053-101.

STATE RACING COMMISSION—LIMITATIONS OF RACING
DATES ASSIGNED TO PERMITTEES—§550.081(3),
F.S. APPLICABLE

QUESTION: What are the limitations of racing dates under our law that may be assigned by the State Racing Commission to the various permittees?

To: *Dr. Curtis A. Haggard, Chairman, Florida State Racing Commission:*

Section 550.04, Florida Statutes, provides in part:

"Horse race track meetings shall be held only from and including the period extending from the 1st day of December of each year to and including the 20th day of April of the year following, which period shall be known as the horse racing season, and the dog race track meetings shall be held only during the period extending from and including the 15th day of November of each year to and including the 31st day of May of the year following, which period shall be known as winter dog racing season."

The statute then provides for summer dog racing by providing "that both horse race meetings and dog race meetings shall be limited to the aggregate number of racing days as provided in Section 550.08, Florida Statutes..."

Section 550.081(3) reads as follows:

"The three racing periods herein above established shall be annually allocated by the state racing commission in the following manner. The horse race track having produced the largest amount of tax revenue during the preceding year of its operation shall be granted its choice of the three established racing periods. The horse race

track having produced the second largest amount of tax revenue during the preceding year of its operation shall be granted its choice of the remaining two established racing periods. The horse race track having produced the third largest amount of tax revenue during the preceding year of its operation shall be allocated the racing period remaining after the two tracks producing the largest amount of tax revenue shall have made their selections; provided, however, that if any one or more tracks entitled to a choice of racing periods as provided for herein shall fail to make a selection the state racing commission shall thereupon assign a forty day racing period to said track or tracks, which period it shall be required to operate unless relieved therefrom by order of the state racing commission; provided further, that if any track heretofore allocated racing dates, shall fail or refuse to operate for its full forty day period, unless prohibited by law or causes beyond its control then the state racing commission may, upon request of any one of the other two tracks affected by this law, allocate the remaining racing dates to either or both of the two established horse racing tracks."

Section 550.03, Florida Statutes, provides in part:

"Provided, however that the Florida state racing commission *may extend said limitations of time* for horse and dog racing not to exceed one day at any one track, when such additional day of racing is conducted under the auspices and for the sole benefit of some one or more *charitable institutions* or organizations, and further provides that for the purposes of this section the University of Miami shall be deemed to be a charitable institution and that a portion of the proceeds available for the charitable purposes in an amount not less than twenty-five per cent thereof shall be paid over to and for the benefit of the University of Miami, and provided further that the total of all profits derived from the operation of such racing on such day including all taxes which would otherwise be received by the state racing commission for such day's operation shall be and become a part of charity fund for which such racing on such days is conducted." (Emphasis supplied)

Section 550.08 sets out the aggregate number of days as follows:

"(1) No license shall be granted to a person or to any race track for a meet or meeting in any county to extend longer than an aggregate of *fifty racing days for horse racing* and ninety days for dog racing in any racing season: Provided the state racing commission *is authorized to grant one additional day of racing during the race meeting period* granted to any track as provided by law upon application and agreement by any track in which one specific day of any meet shall be set aside, and all profit, less actual operating costs, from such specific day's opera-

tions of such track including all taxes payable to the State of Florida or any agency thereof for such day's operation shall be paid into the state treasury for a scholarship fund which shall be administered by the board of control of the institutions of higher learning of the State of Florida for the granting of scholarships for the purpose of attending the institutions of higher learning of the State of Florida upon such terms and conditions as the said board may from time to time prescribe."

"(2) The provisions of this section are supplemental to §550.081 and shall be construed as authority for granting additional days of racing above the total of one hundred and twenty days limitation therein except that each horse race track may run only one additional day as *herein provided* during its race meeting period as authorized by said law and the one hundred and twenty days limitation therein shall in no event be extended beyond three additional days."

Our Supreme Court has held that courts in construing a statute will look to the country to be affected by the statute as well as the purpose declared, to ascertain the legislative intent and will read all parts of the statute together. *Peninsula Land Co. v. Howard*, 149 Fla. 772, 6 So. 2d 384. Our court has also ruled many times and it is a cardinal rule of statutory construction that the court must ascertain the legislative intent and give provisions of the act a field of operation to harmonize with such intent, if possible, by any fair, strict, or liberal construction. *Orlando Transit Co. v. Florida Railroad and Public Utilities Commission*, 160 Fla. 797, 37 So. 2d 321; *State v. Crume*, 131 Fla. 848, 180 So. 38.

It is likewise a cardinal rule that in construing and interpreting a statute all laws in *pari materia* should be considered in order to ascertain the will of the legislature; for that which is within the intention of the makers of the law, is as much within the statute as if it were in the letter. *Bryan v. Dennis*, 4 Fla. 445; *State v. Bowden*, 112 Fla. 288, 150 So. 259. And statutes passed at different sessions of the legislature relating to the same subject and having the same general purpose, may be read together as constituting the law. *Amos v. Conkling*, 99 Fla. 206, 126 So. 283.

It is clear that the normal horse racing season in Florida at the three large tracks is limited to forty consecutive days each, exclusive of Sundays, as between the State and the permit holder where the funds and taxes go to regular state purposes. Section 550.081(3) sets up certain priorities and allocates certain days of racing for the individual tracks.

The legislature however has seen fit to allow the State Racing Commission to extend the racing period as shown by the statutes above for a limited time for certain special purposes:

(1) To extend the limitations of time for horse and dog tracks not to exceed one day at any one track for charitable purposes. Neither §550.081 nor §550.08(2) in express terms or by necessary

implication repealed earlier §550.03 granting an extra day of racing for charitable purposes. Moreover, the State Racing Commission for several years has followed a departmental construction of these statutes which allows an extra day per race track for charitable purposes. Both §§550.081 and 550.08(2) were enacted for very definite purposes other than the repeal of §550.03. Repeals by implication not being favored we cannot advise you to refuse to give effect to §550.03.

(2) One additional day of racing to any track upon its application and agreement for scholarship purposes, but limiting the additional days to three in so far as the large horse racing tracks are concerned for this *specific purpose*.

It should be noted that both of the provisions for extending the racing period are permissive and undoubtedly depend upon the willingness and agreement of the permit holders as well as the permissive consent thereto of the Racing Commission.

I repeat that it is my understanding that the departmental construction placed on these statutes (§§550.03 and 550.08) over the years is to the effect that both are in full force and effect. A practical construction of a statute by a governmental department, while not of such high authority as a judicial interpretation, is, when not in conflict with some constitutional provision or the plain intent of the act in question, of great persuasive force and entitled to consideration by the courts. *State v. Bryan*, 50 Fla. 293, 39 So. 929.

Past conduct and operations of the various race tracks in the matter of setting racing dates should be seriously considered and the commission should follow custom as far as possible.

First, you should determine how many additional days of racing are requested for the horse racing season not to exceed a total of six with no one track allowed more than one day for scholarship purposes nor more than one day for charitable purposes. These days if agreed to by the Racing Commission must become a part of a continuous horse racing season which shall not exceed a total of 126 racing days.

The Florida State Racing Commission in its sound discretion should attach the six additional racing days (if that many are requested) to the regular horse racing season by adding them either immediately prior to December 1st or immediately after April 20th of the following year, or by adding part of the additional racing days immediately prior to December 1st and part immediately after April 20th of the following year. Each horse track requesting such additional two days shall designate any two days it sees fit in the 42 days allotted to it by the Racing Commission for its race meet as its additional days.

In otherwise allocating racing dates you should be guided by §550.081(3), F.S., supra.

September 1, 1953.—053-223.

RACING COMMISSION—RECORDS—OPEN TO
INSPECTION BY THE PUBLIC

QUESTION: Are annual racing applications filed by race tracks with the Florida Racing Commission public records open to public inspection?

To: *Honorable Curtis A. Haggard, Chairman, Florida State Racing Commission, Miami, Florida:*

Section 550.021, F.S., enacted by the Legislature in 1951, provides:

"Records of racing commission, open for inspection; penalty.—

"(1) All books, records, maps, documents and papers of the state racing commission, including those filed with said commission as well as those prepared by or for it, shall at all times be open for the personal inspection of any officer of the State of Florida or of any county of Florida, or of any official investigative body or committee, and no person having charge or custody thereof shall refuse this privilege to any such officer or investigative body or committee.

"(2) Any member or employee of the state racing commission who violates subsection (1) of this section shall be deemed guilty of a misdemeanor and shall be fined not more than one hundred dollars or imprisoned in the county jail not exceeding three months. That any member of said commission who violates said subsection (1) shall also be deemed guilty of malfeasance and shall be subject to removal from office."

Section 119.01, F.S., enacted by the Legislature in 1909, provides:

"Public records open to examination by citizens.—All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

Section 119.02, F.S., provides a penalty for any official violating the provisions of §119.01.

Section 550.021 (a later enactment) did not expressly repeal the provision of §119.01. The general rule of statutory construction which has been followed by Florida courts appears to be that if there is a clear and unreconcilable conflict between statutes, the latter enactment will prevail, (*Hillsborough County Com'rs vs. Jackson*, 58 Fla. 210, 50 So. 423) but that in the absence of a specific repeal, the prior law must be recognized as still in effect if its provisions can be reasonably construed along with the provisions of the later act.

"Because the courts do not favor implied repeal, two acts on the same subject taking effect on the same day will be harmonized and construed as one act if at all possible." (Sutherland Statutory Construction, Vol. I, page 276).

By implication only could §550.021 be construed to mean that inspection of the records identified therein is limited to public officials. Section 550.021 did not expressly repeal the provisions of §119.01 and in my opinion the Legislature did not intend for §550.021, F.S., to result in a repeal of the previous law by implication. There is no express conflict between the two laws, merely a reemphasis of the previous law as regards the keeping of public records open to public officials.

It is my opinion, therefore, that until such time as a Florida court of competent jurisdiction shall determine that §119.01, F.S., does not apply to records filed with the Florida Racing Commission, §119.01, F.S., should be recognized by the Racing Commission and that its records including applications filed with it by race tracks must be treated as public documents open to the inspection of the public.

As pointed out in my opinion of October 31, 1950 (AGO No. 050-510, copy enclosed) records of an investigative nature which contain personal and privileged information and similar data come under a different heading and are not necessarily public documents even though they may be in the custody of a public agency. The agency under such circumstances, is in my opinion, under a duty to exercise discretion in making such information available to the public in general.

Subject to the above questions, your question is answered in the affirmative.

August 23, 1954.—054-207.

STATE RACING COMMISSION—JAI ALAI FRONTONS—
PERMITS—APPLICATION FOR—§550.05, F.S.

QUESTION: "Must an association or a corporation desirous of obtaining a permit to operate a jai alai fronton under Ch. 551, F.S., file its application with the State Racing Commission between June 1st and July 1st, in accordance with §550.05, F.S., it being not desirous to conduct games for the current year but only being desirous of obtaining a permit for the purpose of submitting the permit for the approval of the electorate at a special election and for the purpose of arranging for the construction of the necessary improvements, in no event it being anticipated that there will be any performance of games prior to the succeeding June 1st to July 1st period, at which time proper application would be made for performance dates?"

To: *Honorable Robert H. Carlton, Attorney, State Racing Commission, Tampa, Florida:*

Section 551.12 provides in effect that other than the law relating to elections all provisions of Ch. 550, F.S., (which relates

to dog and horse racing) shall govern as to the operation of jai alai frontons, and particularly mentioned among these provisions are: "dealing with the powers, duties and liability of the state racing commission and of the operators of dog racing tracks and dealing with the location thereof and *with the issuance and granting of permits and licenses to conduct dog racing not inconsistent with the expressed provisions of this chapter...*" (Emphasis supplied).

Now turning to the provisions in Ch. 550 that have to do with the issuance of permits to conduct race meetings, we find that §550.05 provides as follows:

"Between the first day of June and the first day of July of each year, but at no other time, any persons possessing the qualifications prescribed in this chapter shall apply to the commission for a *permit to conduct race meetings and racing* under this chapter. No application thus received by the commission shall be amended after August tenth of each year; and on or before the fifteenth day of August, but not thereafter, of each year, after receipt of any application, the commission shall convene to consider and act upon permits applied for, and all applications not definitely acted upon by the commission on or prior to the fifteenth day of August of each year shall be void.

"Upon all applications filed and approved a permit shall be issued to the applicant setting forth the name, the location of the race track, the kind of racing desired to be conducted and a statement showing qualifications of the applicant to conduct racing at said track under this chapter; *provided, however, no permit shall be effectual to authorize any race until ratified* by a majority of the voters participating in said election, and in the county in which applicant proposes to conduct racing; and provided further that no application shall be considered and no permit shall be issued by the racing commission nor voted upon in any county to conduct horse races, harness horse races or dog races at a location within one hundred miles road travel via most practical route of another location for which a permit has been issued and a racing plant located, except that permits heretofore issued and ratified by a majority of the voters of any county shall not be affected by this proviso." (Emphasis supplied)

Under the provisions of §550.06 once a permit has been issued or in other words an application for establishing a racing plant or jai alai fronton plant has been approved by the Racing Commission, then the holder of such approved application or permit has the right to have the question submitted to the electors of the county as to whether or not such permit shall be ratified or rejected by the voters upon certain conditions which are (1) a written application accompanied by certified copy of the permit approved and granted by the Racing Commission shall be submitted to the board of county commissioners asking for the election, (2) each permit for each track is voted on separately, and (3) no

one permit can be voted on more often than every two years; the county commission shall hold the election within not less than 21 days nor more than 90 days from the time the licensee makes his application to the county commissioners for the election, but the permit holder has a period of six months from the time his application is approved by the Racing Commission before presenting the matter before the board of county commissioners for an election, and if he waits longer than this period the permit issued by the Racing Commission becomes void and of no effect.

From a consideration of all the statutes involved, it is clear that a permit to establish a racing plant is quite different to a permit which authorizes any race track to hold a race meet or meeting or for a fronton plant to operate games.

It is necessary for the Racing Commission to issue permits or licenses yearly to all racing licensees within this state, and in order to give the licensees an opportunity to furnish bonds as required by §550.15, F.S., and give the commission ample time to decide on certain racing dates, it is necessary for the applications for this particular type permit or license (to actually conduct race meetings and racing) to be filed in strict accordance with the provisions of §550.05, F.S., but where an application for a permit to establish a racing plant or jai alai fronton is filed with the commission, it is my opinion that such an application may be filed at any time, provided that the application to actually conduct race meetings or jai alai games at such a plant are filed with the commission at the time set forth in §550.05, supra, and at no other time.

Our Court recognized the distinction in the two types of permits in the case of *State v. Stein*, (Fla.), 176 So. 849, when it said, "The Statutes, Ch. 14832, Acts 1931, as amended by Ch. 17276, Acts of 1935, do not contemplate that it should be necessary for one who has been granted a permit which has been ratified by the voters of a county to conduct a race meeting to have a completed race track and plant ready for operation at the time he applies for and is granted a *license* and the fixing of dates."

This clearly indicates that there are two types of permits, (1) a permit for the establishment of a racing plant or fronton upon approval of the voters, and (2) a permit or *license* to actually operate races or games.

Therefore your question is answered in the negative.

PLUMBING CONTROL LAW

August 11, 1953.—053-196.

PLUMBING—INSTALLATION BY OWNER OF BUSINESS— LICENSE REQUIREMENTS—CH. 553, F.S.— ESCAMBIA COUNTY

QUESTIONS: 1. Under Ch. 553, F.S. as amended, may the owner of a newly constructed business personally install the plumbing in the building when he is not a licensed plumber?

2. If so, may he have the installation done by hired workers who are not licensed and bonded plumbers?

To: Dr. Edward G. Byrne, Assistant Director, Escambia County Health Department, Pensacola, Florida:

With your letter you inclosed a copy of Ch. 26904, Laws of 1951, which is now carried as Ch. 553, F.S. Although Ch. 553 was extensively amended by the recently adjourned Florida Legislature, a study of those amendments does not reveal that they would have any bearing upon the questions being considered here.

Since your question does not indicate any other conclusion, it is assumed that Escambia County has brought itself within the provisions of Ch. 553 as amended and that there are no special or local laws that would have any effect on your questions.

Section 553.11(2) exempts from the effect of Ch. 553 persons who make minor repairs of plumbing on their own property and §553.11(4) exempts persons who install plumbing in their own residences. The act purports to regulate "plumbing" as such and defines it in §553.03(2). Inasmuch as the Act only makes the exemptions above noted it does not appear that exemption is provided for owners of a newly constructed business in installing the plumbing therein as distinguished from a residence of minor maintenance.

The constitutionality of said Ch. 553 is assumed for the purpose of this opinion. Only the Courts and not this office can with finality pass upon the constitutionality of Acts of the Legislature.

On the basis of these considerations it is my opinion that your questions should be answered in the negative.

CHAPTER XXXII

LIQUORS AND BEVERAGES

BEVERAGE LAW; ADMINISTRATION

February 24, 1954.—054-47.

ALCOHOLIC BEVERAGES—DISTILLERS— REGISTRATION FEE

QUESTION: Does §1 of Ch. 28149, Laws of Florida, Acts of 1953, apply to the actual manufacturer, distiller, rectifier, processor, etc., of spirituous liquors, and, therefore, require all such manufacturers, distillers, etc., to comply with said section and pay the registration fee, or may a broker, or middleman who sells and offers for sale brands of intoxicating and spirituous liquors manufactured by numerous companies pay one registration fee and register all brands that the said broker, or middleman, may handle?

To: *Honorable A. E. McKinney, Jr., Director, State Beverage Department:*

Section 1 of Ch. 28149, Laws of Florida, Acts of 1953, provides as follows:

"No manufacturer, distiller, rectifier, processor, blender or bottler of spirituous liquors, whether licensed under the beverage laws of this state or not, shall sell or offer for sale in this state, or move or cause to be moved within this state, or into this state from any other state, any spirituous liquors, without first registering its name and the brands or labels under which the spirituous liquors are to be sold or moved, and furnishing such samples and such information as to content, quality, age, proof and formula of such spirituous liquors as the Director may require. Each registrant shall pay a registration fee of five hundred dollars (\$500.00) annually, which fee shall entitle the registrant to register as many brands or labels as it shall register at one time. New brands or labels shall be registered at a charge of ten dollars (\$10.00) per brand or label. Any registration may be suspended or revoked in the same manner as a beverage license for any violation of the beverage law. The Director shall promulgate suitable rules for carrying out the purpose of this section."

In answering the question which you have propounded, it necessarily involves the construction of the above section of our statutes.

The function of statutory construction is to further, and not to defeat, the purpose of the legislation. The sole object is to discover and fix the true sense and meaning of the legislation, in other words, find out the intent of the legislature and once that

is found that is the law. The intent of the legislature is the pole star that guides our courts in construing and interpreting a statute.

Generally in construing a statute the courts may consider the evil to be corrected, the language of the Act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject. However, where the legislative intent is clearly manifest by the language used, considered in its ordinary and grammatical sense, rules of construction are unnecessary and inapplicable. *Smith v. Ryan* (Fla.), 39 So. 2d 281.

The clear and unmistakable language and meaning of §1 of Ch. 28149, Laws of Florida, Acts of 1953, *supra*, is to prohibit manufacturers, distillers, rectifiers, processors, blenders or bottlers of spirituous liquors from selling or moving merchandise into this state *without* registering its name and the brands or labels under which the spirituous liquors are to be sold or moved and furnishing the State Beverage Director with certain materials and information relating to the liquors, such as age, quality, proof and formula. The statute also requires such organizations to pay a certain registration fee. The obvious purpose in the legislation is to require the distiller, manufacturer, etc., or organization responsible for the manufacture of the liquor, to register the brands and give the analysis. The manufacturer or producer is the person or agency in the best position to furnish such information, not some broker or middleman. Then too if some subsequent investigation and analysis should show the registered product to be inferior to the sample and analysis filed with the Director of the Beverage Department, the statute by its requirements fixes the person or organization on whom the responsibility can be placed.

The Supreme Court of Florida in the case of *State v. Vocelle*, 159 Fla. 88, 31 So. 2d 52, said:

"It is established law that a sovereign state, when functioning under its police power, may enact such measures as are reasonably calculated to be essential or necessary in behalf of the general welfare for the control and regulation not only of the sale but the possession of intoxicating liquors. The form or method of regulation and control is one of public policy for the decision of each state, and frequently the prevailing view is reflected by appropriate legislative enactments..."

Also, in the case of *Holloway v. Schott*, 64 So. 2d 680, our court said:

"There is no field in which the courts have recognized a wider latitude for the exercise of the police power—nor one where there is greater need therefor—than in the sale or possession of intoxicating liquors. The public welfare demands the strictest scrutiny of this business by those entrusted with and who have the responsibility of law enforcement and they must be clothed with sufficient power—within constitutional limits—properly to supervise it..."

It will be noted that the statute involved here places a re-

quirement on manufacturers and distillers wishing to sell, offer for sale or move their merchandise in the State of Florida, to register their brands and pay a registration fee *whether licensed under the beverage laws of Florida or not.*

These are not restrictive words and the power to regulate carries full power over the thing subject to regulation, and in the absence of restrictive words, this power must be regarded as plenary over the entire subject. See *Makos v. Prince*, 64 So. 2d 670.

Therefore, from the above observations, it is my opinion that if a distiller or manufacturer wishes his or its brands of liquor to be sold or moved in Florida, said distiller or manufacturer must register his or its brands and furnish such information to the State Beverage Department as is required by law.

October 13, 1954.—054-238.

HOTELS AND RESTAURANTS—LIQUOR LICENSES—REQUIREMENTS

QUESTION: May hotels and restaurants which have been granted a liquor license under the provisions of §561.20, Subsection (2), F.S., commonly known as the exception law, operate their bars during the summer months while the hotels and restaurants including all of their facilities are closed to the public?

To: *Honorable A. E. McKinney, Jr., Director, State Beverage Department, Tallahassee, Florida:*

Section 561.20, Subsection (1), places a limitation on liquor licenses and limits these licenses to one such license for every 2,500 residents or major fraction thereof in any city and county. The legislature in its wisdom saw fit to make an exception to this limitation provision and this exception is provided for in Subsection (2) of Section 561.20, which is as follows:

"No such limitation of the number of licenses as herein provided shall be applicable to any hotel of not less than fifty guest rooms or to any restaurant containing all necessary equipment and supplies for, and serving full course meals regularly and having accommodations for service of two hundred or more patrons at tables and occupying more than four thousand square feet of space; provided however, that any licenses heretofore or hereafter issued to any such hotels or restaurants under the provisions of any law shall not be moved to a new location, such licenses being valid only on the premises of such hotel or restaurant, and providing further, that licenses issued to hotels or restaurants under the general law and held by such hotels or restaurants on May 24, 1947 shall be counted in the quota limitations contained in subsection (1) herein." (Emphasis supplied)

It is quite clear that the intent and purpose of the Legislature in enacting Subsection (2) of §561.20, *supra*, was for the purpose of providing large hotels and restaurants with a liquor license for serving its guests and customers alcoholic beverages. There

is no intent in said section that such hotels and restaurants may operate a bar (by means of the special liquor license) separate and apart and independent of the hotel and restaurant business.

This construction we think has already been adopted at least to some degree by the Supreme Court of Florida in the case of *State v. Noel*, 124 Fla. 852, 169 So. 549, when the Supreme Court of Florida upheld a city ordinance of the City of Miami, which ordinance prohibited the sale of intoxicating liquor by licensed dealers between the hours of 10:00 P.M. and 6:00 A.M., but excepted hotels having 100 or more rooms and allowed such hotels to sell liquor between 10:00 P.M. and midnight on weekdays to registered guests only.

Of course the complaint was that this ordinance was unconstitutional and void since it discriminated in favor of hotels, however, the Supreme Court held the ordinance good, and in so doing, said:

"We may suggest as a reasonable basis for the classification, that in very large hotels the bar is an incident merely, and that the hotel management, under constant supervision of the state, will see to it, by reason of self-protection, that the bar is conducted in an orderly, decent manner; whereas, in the smaller hotels the liquor business may be the principal, and the hotel the incident. Where the dividing line may be placed is primarily for the decision of the Legislature, and it is not, nor from our knowledge of Florida as a state, much frequented by winter tourists, can it decently be claimed, that the line is so placed as to apply to but few hotels..."

So it is that where an exception license has been granted, the liquor business should be a mere incident to the main business of the hotel or restaurant, and it is my opinion that in such cases these bars cannot be operated separate and apart and independent of the hotel or restaurant. To hold otherwise would be to disregard Subsection (1) of §561.20, F.S.

October 16, 1953.—053-275.

STATE BEVERAGE DIRECTOR—ALCOHOLIC BEVERAGES—DISCOUNTS

QUESTION: Does Ch. 28149 (Senate Bill #839) Laws of Florida, Acts of 1953, or any other provisions of existing law, authorize the Director of the Beverage Department of the State of Florida, to set maximum allowable discounts between the vendor of alcoholic beverages and the consumer?

To: Honorable J. R. Hunter, Jr., Director, State Beverage Department:

This office was called upon by your predecessor, Honorable Sam F. Davis, for an opinion on whether or not the State Beverage Director possesses the authority to set a minimum manufacturing, wholesale, and retail price on the sale of alcoholic beverages.

On April 13, 1953, in Opinion No. 053-82, this office pointed

out to the Director of the State Beverage Department that the Supreme Court of Florida in the case of *Scarborough v. Webb's Cut Rate Drug Store*, 150 Fla. 754, 8 So. 2d 913, struck down Chapter 566, Florida Statutes of 1941, being known as the Beverage Fair Trade Law, as unconstitutional and also in 1949 in the case of *Liquor Stores v. Continental Distilling Corporation* (Fla.), 40 So. 2d 371, our court held the Fair Trade Law, then Chapter 541, Florida Statutes, unconstitutional and void because that statute was in effect a price fixing statute, and therefore, this office advised Mr. Davis that he had no authority to fix prices either directly or indirectly.

The question which you now raise is actually whether or not the enactment of Ch. 28149, Acts of 1953, has changed the law as it formerly existed.

Examining the title to Ch. 28149, we find that the act is principally an act requiring manufacturers and distributors to register their names and brands or labels of their products with the State Beverage Director and requiring certain of their employees to be licensed as salesmen. The only thing that this act does in any way that might be connected with prices of products is that it amends Subsection (13) of §561.01, F.S., which is the section of the statute relating to definitions. That section now reads as follows:

"561.01(13) The term 'discount in the usual course of business' shall mean a cash discount given simultaneously at the time of sale, which shall not exceed the allowable discount fixed by the Director. Any discount which exceeds the allowable discount which the Director by rule shall fix, shall be considered as an arrangement for financial assistance by gift."

It will be noted in referring to the Beverage Act as a whole that only §561.42, F.S., has any reference to the giving of *trade discounts in the usual course of business upon liquor sales*. That section of the statute particularly relates to the Tied House Evil Law and is only applicable to the relationship between manufacturers, wholesalers or distributors and retailers. It has no application as between a retailer and a consumer of retail products.

Section 561.42, commonly referred to as the Tied House Evil Law, prohibits manufacturers or distributors from having any financial interest either directly or indirectly in any retail alcoholic beverage vending business except such manufacturers or distributors may allow such retail vendors trade discounts in the usual course of business upon liquor sales.

In the light of these observations, it is my opinion that Ch. 28149, Acts of 1953, does not give the State Beverage Director any authority to fix or set discounts on alcoholic beverages as between the retail vendor of alcoholic beverages and consumer. The authority given the Beverage Director under Ch. 28149, *supra*, to enforce that act in so far as it relates to the fixing of allowable discounts is limited to trade discounts in the usual course of business relating to transactions between manufacturers, distributors or wholesalers and retailers, as expressly used in §561.42, the Tied House Evil Law.

September 25, 1953.—053-251.

COUNTY TAX COLLECTORS—LICENSE TRANSFER FEE—
BEVERAGE LICENSES

QUESTION: When and under what circumstances may county tax collectors require a license transfer fee on the transfer of a beverage license as required by Ch. 28123, Laws of Florida, Acts of 1953?

To: *Honorable J. R. Hunter, Jr., Director, State Beverage Department:*

Chapter 28123, Acts of 1953, amended §561.32, F.S., as follows:

"Licenses issued under the provisions of the beverage law shall not be transferable except as follows: When a licensee shall have made a bona fide sale of the business which he is so licensed to conduct he may obtain a transfer of such license to the purchaser of said business, provided the application of the purchaser shall be approved by the Director of the Beverage Department in accord with the same procedure provided for in Sections 561.17, 561.18 and 561.19 of the Beverage Law, in the case of issuance of new licenses; provided further, however, that no one shall be entitled as a matter of right to a transfer of a license when revocation or suspension proceedings have been instituted against a licensee, and transfer of license in any such case shall be within the discretion of the Director; provided further before the issuance of any transfer of license herein provided the transferee shall pay the following transfer fee applicable to the tax collector of the county, and said transfer fee shall be remitted to the Beverage Director on or before the tenth (10th) day of the following calendar month:

"LICENSES ISSUED UNDER
SECTION 561.34, FLORIDA
STATUTES

TRANSFER LICENSE FEE

(1) (a)	\$6.00
(1) (b)	3.00
(2) (a)	20.00
(2) (b)	
(3) (4) (5) (6) (7) (8)	10% of the total
(9) (10) (11) & (12)	10.00
	state, county and city, if any, annual license fees.

"All licenses issued under Section 561.35, Florida Statutes, shall pay a transfer license fee equal to 10% of the total state, county and city, if any, annual license fee.

"There is here imposed a service fee of twenty-five (25¢) cents on each such transfer license issued under this Section and shall be collected by the county tax collector from each transferee upon the issuance of any such

transfer license. The service fee shall be retained by the tax collector and accounted for as a part of his funds in accordance with law."

Section 561.15, F.S., provides:

"Licenses shall be issued only to persons of good moral character, who have not been convicted of any offense involving moral turpitude, and who are not less than twenty-one years of age. Licenses to corporations shall be issued only to corporations whose directors and officers are persons of good moral character and who have not been convicted of any offense involving moral turpitude. There shall be no exemptions from the license taxes herein provided to any person, association of persons or corporations, any other law to the contrary notwithstanding." (Emphasis supplied)

It will be noted from the above section of the statute that both persons and corporations may have beverage licenses issued to them, and the Supreme Court of Florida held in *State Board of Funeral Directors and Embalmers v. Cooksey*, 156 Fla. 761, 21 So. 2d 542, that where the statute permitted it a corporation could engage in the business of funeral director. Therefore, it seems that when a liquor license or beverage license is issued in the name of a corporation, the corporation is actually the licensee and can engage in the business of a retail or wholesale liquor or beverage dealer.

Turning now to the provisions of Ch. 28123, Acts of 1953, it will be noted that the *only* time that a tax collector can charge a license transfer fee is when there has been a *bona fide sale of the business* from a person licensed to conduct such business to a purchaser of said business and under no other circumstances shall such fee be charged.

It will be noted that Ch. 28123, *supra*, makes no provision for any reduction in rate of a license transfer fee for a part of a year or for a so-called "half year" license, therefore, the entire amount would apply.

In cases of corporations holding beverage licenses under the laws of this state, the mere transfer of stock from one stockholder to another or the changing of stockholders or changing of officers of the corporation would not be a "transfer" of license within the terms of the act under consideration because of the corporation in the entity holding the license. Of course the officers of the corporation must be satisfactory to the State Beverage Department.

On the other hand, if a beverage license is owned by a corporation and the corporation dissolves and the same persons that formerly held all the stock in the corporation form a partnership and wish to be licensed under the beverage law, such a move would necessitate a "transfer" of the beverage license because there is a complete change, by operation of law, of ownership from a corporation to a partnership.

The thing to be remembered in the administration of this law is that there must be a bona fide sale of the business before the tax collector may charge a "transfer" license fee or tax.

November 4, 1954.—054-246.

LIQUOR LICENSE—TRANSFER FEE—NORTH MIAMI, CITY OF

QUESTION: Whether or not the City of North Miami may by appropriate ordinance charge any fee for the transfer of a liquor license under the provisions of §561.32, F.S.?

To: *Honorable Richard J. Thornton, Attorney, City of North Miami, Miami, Florida:*

Section 561.36, F.S., provides as follows:

"Each incorporated city or town in the state may levy and collect a license tax on each manufacturer, distributor, vendor, caterer and club having a place of business or club house or club rooms within the corporate limits of such city or town not to exceed fifty per cent of the state and county license tax herein provided, but if such city or town provides and collects such license tax the manufacturer, distributor, vendor or club paying such license tax shall be entitled to a reduction in his state and county license tax of the amount so paid for such city or town license tax, upon exhibiting to the county tax collector a receipt for the payment of such city or town license tax. Such city or town license shall not apply to state and county licensee who shall have paid their state and county license tax before the ordinance providing for such city or town license tax shall have become effective.

"No tax on the manufacture, distribution, transportation, importation or sale of such beverages shall be imposed by way of license, excise or otherwise, by any municipality, any thing in any municipal charter, special or general law to the contrary notwithstanding, except as herein expressly authorized."

Section 561.32, F.S., provides, in part, as follows:

"Licenses issued under the provisions of the beverage law shall not be transferable except as follows: When a licensee shall have made a bona fide sale of the business which he is so licensed to conduct he may obtain a transfer of such license to the purchaser of said business, provided the application of the purchaser shall be approved by the director of the beverage department in accord with the same procedure provided for in §§561.17, 561.18 and 561.19 of the beverage law, in the case of issuance of new licenses; provided further, however, that no one shall be entitled as a matter of right to a transfer of a license when revocation or suspension proceedings have been instituted against a licensee, and transfer of license in any such case shall be within the discretion of the director;

provided further before the issuance of any transfer of license herein provided the transferee shall pay the following transfer fee applicable to the tax collector of the county, and said transfer fee shall be remitted to the beverage director on or before the tenth day of the following calendar month:

LICENSES ISSUED UNDER §561.34, FLORIDA STATUTES	TRANSFER LICENSE FEE
(1) (a)	\$6.00
(1) (b)	3.00
(2) (a)	20.00
(2) (b)	10.00
(3) (4) (5) (6) (7) (8)	
(9) (10) (11) & (12)	10% of the total state, county and city, if any, annual license fees.

"All licenses issued under §561.35, Florida Statutes, shall pay a transfer license fee equal to ten per cent of the total state, county and city, if any, annual license fee."

The Supreme Court of Florida in the case of *Langston v. Lunsford*, 122 Fla. 813, 165 So. 898 held that §561.36, F.S., allows licensed distributors of alcoholic beverages whose businesses are located within the State of Florida, without any additional license, to sell and deliver beverages to retailers in cities other than the one in which they are licensed. This holding by the court made invalid an ordinance of the City of Panama City requiring alcoholic beverage distributors to secure a city license prior to delivering beverages in that city. The court pointed out that §561.36 expressly provided that *no additional tax should be imposed* regardless of city charter provisions. The court in that case, after pointing out the provisions of the 1935 alcoholic beverage act, stated:

"So it appears that a duly licensed manufacturer or distributor whose principal place of business, or branch, is located in some other city of Florida, has, under the statute, the right to sell the licensed alcoholic beverages to other licensed distributors, or to vendors of such beverages, and transport and deliver them, at wholesale in Panama City without paying that city a license, and if he can do that, the necessary implication is that he, or his employees, can solicit orders or requests for deliveries of such beverages as he is authorized by his state license to sell and deliver. The ordinance in question is therefore in conflict with, and repugnant to, the state statute, at least in so far as such ordinance is attempted to be enforced against a duly licensed manufacturer or distributor, or his agents or employees, whose place of business or plant is located in some other county or city, as in this instance, and who, under the state law, is not required to obtain a license from Panama City in order to authorize

him to sell and deliver such beverages therein. Any other construction would make it possible to utterly defeat the plain purpose of this comprehensive statute."

Section 561.36, F.S., provides for the only tax that a city can impose. Such tax is restricted to 50% of the state and county license tax on each manufacturer, distributor, vendor, caterer or club and has no reference to the license transfer fee. Section 561.32, F.S., in nowise authorizes any transfer tax for a municipality. The tax imposed by §561.32, F.S., is payable solely to the county tax collector for remission to the State.

I am therefore of the opinion that a city under the holding of *Langston v. Lunsford*, supra, cannot charge any fee for the transfer of a liquor license.

February 3, 1953.—053-23.

STATE BEVERAGE DEPARTMENT—DIRECTOR—POWERS—
LAW VIOLATIONS—COMPROMISE—§561.53, F.S.

QUESTION: What violations of law may be compromised by the Director of the State Beverage Department under the provisions of §561.53, F.S.?

To: Honorable Sam F. Davis, Director, State Beverage Department:

Section 561.53, F.S., provides as follows:

"The director of the state beverage department is hereby vested with the power and authority to compromise a violation of the alcoholic beverage control laws of Florida in an amount not to exceed five dollars; provided that each taxable item involved in a transaction constituting a violation of the alcoholic beverage control laws of Florida, in the discretion of the director may be deemed to be a violation and each such violation may be compromised as aforesaid and in an amount as aforesaid; and provided, further, that any compromise of any violation arising out of a single transaction shall be limited to not more than one thousand dollars."

You will note that this provision gives the director power and authority to compromise the violation of the alcoholic beverage control laws of Florida.

Section 561.01(9), F.S. provides as follows:

"The term 'the beverage law' shall refer to chapters 561, 562, 568 and 569 of Florida Statutes."

It is clear that the beverage director has no authority to compromise any type of violation other than those contained in the above four chapters of the Florida Statutes, and the proviso provision of §561.53 further limits the director's authority to compromise violations of the beverage law to taxable items which means that if some tax has not been paid or if beverages were possessed by the licensee on which certain taxes had not been paid,

or the correct amount had not been paid, then and in such event, the director has authority to enter into compromise procedures. However, this authority does not extend to violations such as gambling on the premises, operating lotteries, possessing, selling and transporting moonshine whiskey, selling alcoholic beverages during unlawful hours, selling, serving, etc., to minors.

Without ruling on the constitutionality of §561.53, F.S. it is my opinion that the beverage director's authority to compromise violations of the beverage law is limited to instances involving a taxable item where there is a possibility of mistakes in taking inventory or checking stock or failure on the part of a manufacturer to properly stamp liquor and the same later be offered for sale without stamps or without the proper amount or type of stamps, or some minor infraction of the law relating to taxes due the state.

August 19, 1954.—054-205.

BEVERAGE DIRECTOR'S POWERS—LIQUOR STORE
LOCATION—LICENSES—CHURCHES—ZONING
REGULATIONS—DADE COUNTY

QUESTION: Is the operator of a proposed liquor store at a location closer than the permitted distance from a church which has been established in fact, although the establishment and operation of such church are contrary to the zoning regulations of Dade County, entitled to a license for such liquor store?

To: *Honorable Park H. Campbell, County Attorney, Dade County, Miami, Florida:*

If the proposed location of a liquor store lying outside the limits of any incorporated city or town in Dade County, Florida, is closer to an established church than the distance permitted by the county resolution adopted in accordance with the provisions of §561.44(2), F.S., then it is my opinion that the State Beverage Director has no authority to issue a license for such a place of business.

The question as to whether or not the church has been established and is operating contrary to the zoning regulations of Dade County is a legal question and is not a matter upon which the Beverage Director can pass upon since he is not a judicial officer. He can, however, perform the ministerial duties of measuring distances from the proposed location to the church and determine whether or not said distances are in violation of the state law or county zoning resolution as it relates to such distances.

In this connection see *Dade County v. Overstreet*, 59 So. 2d 862, wherein our court said:

"When the above cited provisions of the Beverage Act are read in *pari materia* with the several provisions of §561.44, it is quite clear that the Legislature never intended to confer on the State Beverage Director the power or authority to examine into charter provisions of the several municipalities of Florida and determine therefrom whether or not zoning ordinances were enacted

in accordance therewith, or the power to examine into the several Acts applicable to counties of Florida and ascertain whether or not zoning resolutions adopted by the several Boards were enacted pursuant to law. It may be true that the Beverage Director under the provisions of the Beverage Act, has the power not only to approve applications for licenses to sell intoxicating liquors, but also to approve a transfer of and existing license to locations within the municipalities or without, if in conformity with existing zoning measures enacted by the municipalities and the several counties.

"The proposed location of a liquor store, or the correct distance of the same from a church or school, or similar questions under the Statutes or under zoning ordinances or resolutions of a County or City, should be challenged on the ground that such statutes, ordinances or resolutions with reference thereto are illegal or unconstitutional; the same should not and cannot be adjudicated by the Beverage Director, or any other Board or Bureau, as these are clearly judicial questions for determination by the Circuit Courts under §11 of Art. V. of the Consti. of Florida, F.S.A. The Director is not a judicial officer authorized to determine these questions. He may and should perform the ministerial duty of making measurements or investigations of locations to ascertain whether or not the locations would violate the statutes or zoning ordinances or resolutions. See *Pickerill v. Schott*, Fla., 55 So. 2d 716."

August 30, 1954.—054-211.

STATE BEVERAGE DEPARTMENT—SUPERVISORS'
AUTHORITY—SEARCH WARRANTS—VIOLATIONS
OF BEVERAGE AND CIGARETTE LAWS

QUESTION: Does a supervisor of the State Beverage Department have authority under the law to serve a search warrant in the State of Florida when the crime or crimes alleged in the affidavit and application for such search warrants are violations of the State Beverage Laws of Florida?

To: *Honorable A. E. McKinney, Jr., Director, State Beverage Department, TALLAHASSEE:*

Section 933.07, F.S., provides as follows:

"The judge or magistrate, upon examination of the application and proofs submitted, if satisfied that probable cause exists for the issuing of the search warrant, shall thereupon issue a search warrant signed by him with his name of office, to any sheriff and his deputies or any constable, police officer or other person authorized by law to execute process, commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified, and to bring the same before the magistrate or some other court having jurisdiction of the offense."

Section 561.07, F.S., provides as follows:

"The supervisors shall have access to and shall have the right to inspect the premises of all licenses under the beverage law and under the cigarette tax law now in effect or which may hereinafter be reenacted, to collect taxes and remit them to the officers entitled to them and to examine the books and records of all licensees. The supervisors shall require of each licensee strict compliance with the laws of this state relating to the transaction of such business. Such supervisors shall have all the power of deputy sheriffs in the enforcement of the beverage laws and the cigarette tax laws of this State, and in the prosecution of offenders against such laws."

The Supreme Court of Florida held in the case of *State v. Quigg*, 154 Fla. 448, 17 So. 2d 697, that a search warrant may be issued to and executed by a municipal police officer.

Of course, if such municipal police officer served a search warrant for the violation of a state law, he would necessarily make the return of the warrant to the proper state court.

Likewise our court, in the case of *Harvey v. Drake*, 40 So. 2d 214, held a search warrant good which was directed "to all and singular the sheriffs and constables and the supervisors of the Beverage Department of the State of Florida," and ordering the officers executing the same to make return of their doings thereunder to the judge issuing the warrants. The warrants in the *Drake* case were served by beverage supervisors and quantities of red liquor in dry counties were seized. This seems to be the nearest case in point that has reached the Supreme Court of Florida, and while the particular question was not raised, it is my opinion that supervisors of the State Beverage Department, for the purposes of enforcing beverage laws and violations of other laws by holders of beverage licenses in their places of business are police officers within the language and terms of §933.07, *Supra*, and therefore warrants can be directed to such supervisors and served by them for such violations.

In the light of the holding of the Supreme Court of Florida in the case of *Boynton v. State*, 64 So. 2d. 536, authority for supervisors of the State Beverage Department to have search warrants issued to them and to serve the same is limited to violations of the beverage and cigarette laws of the State of Florida.

BEVERAGE LAW; ENFORCEMENT

September 1, 1953.—053-225.

ALCOHOLIC BEVERAGES—HOURS OF SALE—REGULATION BY CITIES AND COUNTIES

QUESTIONS: (1) Since §562.14(3), (4), F.S., allow incorporated cities and the boards of county commissioners to independently regulate the hours of sale of alcoholic beverages within their respective spheres of authority, if an incorporated city or a county, as the case may be, takes no action under the provisions

of the above sections of the statute, does the State law apply as set forth in §562.14(1), (2), F.S.?

(2) If a city takes action by city ordinance toward the regulation of sale of "alcoholic beverages" without regulating the sale of "intoxicating beverages," does §562.14, subsection (2) control?

(3) In view of §562.14(3), (4), F.S., authorizing incorporated cities or the boards of county commissioners, as the case may be, to regulate hours of sale of alcoholic beverages, do the provisions of §562.14(1), (2), F.S., as to consumption, service and permitting and allowing persons to be served alcoholic or intoxicating beverages apply?

To: Honorable Clyde Campbell, County Attorney, Okaloosa County, Crestview, Florida:

QUESTION ONE:

It is clear from the statute itself that §562.14(3), (4), are permissive statutes, allowing the various incorporated cities or towns and the counties, through their boards of county commissioners, to independently regulate the hours of sale of alcoholic beverages if they so desire, but in case no action is taken by a city or county, then, of course, the State law, as provided for in §562.14(1), (2), applies.

QUESTION TWO:

"Alcoholic beverage" is defined in Section 561.01, Florida Statutes, as follows: "The term 'alcoholic beverages' shall include all beverages containing more than 1% of alcohol by weight." It is my opinion that if a city passes a city ordinance or the board of County Commissioners adopts a resolution regulating the hours of sale of alcoholic beverages and makes no attempt to regulate the sale of intoxicating beverages, then and in that event, intoxicating beverages are automatically regulated by the ordinance or resolution regulating alcoholic beverages since the term "alcoholic beverages" includes intoxicating beverages and there is no question but that the city and the board of county commissioners can, by proper ordinance or resolution, regulate both. See *Makos v. Prince*, 64 So. 2d 670.

QUESTION THREE:

It is true that the language in §562.14(3), (4), specifically gives cities and counties, through their respective governing bodies, authority by proper action to independently regulate the hours of sale of alcoholic beverages and no mention is made, expressly or specifically, that the said city or county has the authority to also regulate the service and consumption of alcoholic or intoxicating beverages.

Subsection (1) of §562.14, F.S. was originally §1 of Ch. 21944, Laws of Florida, Acts of 1943, which provided that no alcoholic beverages could be sold, consumed, or served, or permitted to be served, or consumed, in any place holding a license under the State Beverage Department of Florida, between midnight and seven o'clock A.M. of the following day and prohibited the sales or service

of intoxicating beverages between twelve o'clock P.M. Saturday and seven o'clock A.M. Monday, *except* that in incorporated cities and towns such *sales and service* on Sundays may be permitted and regulated by municipal ordinance, etc.

Subsection (3) of the 1943 act gave cities authority to regulate sales by city ordinance. Chapter 23746, Laws of Florida, Acts of 1947, practically rewrote the entire beverage act and amended §562.14, F.S., 1951, and it was in this act by Subsection (4) of §16 that the boards of county commissioners were given the authority to independently regulate the hours of sale of alcoholic beverages in the territory of the county lying outside of municipalities. We necessarily must construe the whole of §562.14 together to glean the legislative intent because where there is an amendment to a section of the statute, the amendatory section takes the place of the section amended as part of the original act. *Miami Bridge Company v. Railroad Commission*, 155 Fla. 366, 20 So. 2d 356, certiorari denied 65 Sup. Ct. 1405, 325 U.S. 869, 89 L. ed 1987.

Cities and counties have interpreted §562.14(3), (4), F.S., as authorizing them to regulate the consumption and service of alcoholic beverages as well as the sale of same. It will be noted that the county resolution before our court in the case of *Makos v. Prince*, *supra*, provided among other things that the Board of County Commissioners of Palm Beach County "hereby fixes and declares the hours of sale of alcoholic beverages, where alcoholic beverages may be sold, consumed or served in any place holding a license under the State Beverage Department of Florida, whether bars, package stores or a combination of both, to be as follows:..."

From these observations, your third question is properly answered in the affirmative.

May 5, 1953.—053-92.

AMERICAN LEGION—CLUB LIQUOR LICENSE—HOURS OF SALE—REGULATIONS—§562.14, (2), F.S. OSCEOLA COUNTY

QUESTIONS: 1. May the American Legion operating under a club liquor license in Osceola County, legally sell intoxicating liquors on Sunday?

2. May such organization, operating as above described, legally sell liquor at any time to individuals who are not members of the Legion, but who pay a special fee to associate with the Legion for the use of the club's privileges?

To: Robert M. Buckels, Sheriff, Osceola County, Kissimmee, Florida:

I have not been furnished any information as to the location of the American Legion Post in Osceola County which has a club liquor license issued under the provisions of Subsection (11) of §561.34, and in the absence of a city ordinance or county resolution regulating the hours of sale, distribution, etc., of alcoholic beverages, the controlling laws on hours of operation of all liquor licensed places of business in Florida in Subsection (2) of §562.14, which provides:

"No intoxicating beverages may be sold, consumed or served or permitted to be served, or consumed, in any place holding a license under the state beverage department of Florida, between twelve o'clock midnight Saturday and seven o'clock A.M. Monday."

It is recognized that the Supreme Court of Florida in the case of U.S.S. Post #5 v. Schleman, 53 So. 2d 302, held that the Legion Post, a club licensee, was not a retail liquor dealer, and therefore, as expressly provided in §561.34 (11), the payment of a club license tax authorizes the service and distribution to members and nonresident guests of the club *only* and such service and distribution to the members or nonresident guest *shall not* be deemed sales within the meaning of the law in this state.

But here it is distribution and service to members and therefore would come within the prohibition of Section 562.14(2), in the absence of City ordinance or county resolution to the contrary.

Therefore, the American Legion operating under a club license could not serve or distribute intoxicating liquor to its members on Sunday subject to the reservation theretofore made.

As to your second question, Section 561.34 (11), provides in part as follows:

"... the payment of such club license tax shall authorize the service and distribution to *members and nonresident guests of the club only* and such service and distribution to said *members and nonresident* guest shall not be deemed sales within the meaning of the law in this state but any *service or distribution to anyone other than a member or nonresident guest* of such licensed club shall be deemed a sale and any officer, member or employee of any such licensed club who shall sell or distribute or serve any such beverages to any person *other than a member or nonresident guest of such club* for money or other value shall be deemed guilty of selling such beverages without a license and shall be punished as provided by law..." (Emphasis supplied).

It is clear from the language of this statute that persons who merely associate with a club for a fee to use the club's privileges are not members of the club nor are they nonresident guests of the club, and therefore cannot legally be served by such a club.

BEVERAGE FAIR TRADE LAW

April 13, 1953.—053-82.

STATE BEVERAGE DIRECTOR—NO AUTHORITY TO FIX PRICES ON SALES OF ALCOHOLIC BEVERAGES

QUESTION: "Does the State Beverage Director possess the authority to set a minimum manufacturing, wholesale, and retail price on the sale of alcoholic beverages?"

To: Honorable Sam F. Davis, State Beverage Director:

The legislature of the State of Florida in 1941 enacted Chapter 21001, Laws of Florida, Acts of 1941, which subsequently became known as Ch. 566, F.S., the Beverage Fair Trade Law.

The Supreme Court of Florida held in *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 754, 8 So. 2d 913, that Section 2 of that act left prices to be fixed by distributors and provided for no hearing and invaded the property rights of owners of trademarked liquors; that there was no legislative finding of necessity therefor or provisions made for any finding of necessity that the statute gave no indication that it was passed to promote public health, safety, morals or welfare and that therefore the statute was unconstitutional.

In 1949, in the case of *Liquor Store v. Continental Distilling Corporation (Fla.)*, 40 So. 2d 371, our court had before it Ch. 541, F.S., the Fair Trade Law, and in that decision they held that the Fair Trade Law of Florida was unconstitutional and void because the statute was in effect a price-fixing statute. Said the court in that case:

"The statute is, in fact, a price fixing statute. The power to fix the price is vested in an interested person who is not an official. There is no review of his act. He is required to consult with no one and in no sense is required to take into consideration the cost of the article or the unreasonableness thereof... Throughout all our holdings we have recognized as basic that for a statute such as this to be upheld there must be some semblance of a public necessity for the act and it must have some relation to the public health, morals or safety."

In the light of our court's holding in these two cases, invalidating the Beverage Fair Trade Act and also the general Fair Trade Act, I do not believe you have any authority to fix prices either directly or indirectly. Therefore, your question is answered in the negative.

CHAPTER XXXIII

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

STATE PLANT BOARD

May 26, 1953.—053-110.

STATE PLANT BOARD—PURCHASE OF LAND—TITLE TAKEN IN NAME OF

QUESTION: The State Plant Board proposes to purchase a parcel of land to enable it to carry out its duties under the statutes. Who should be named as grantee in the deed?

To: State Plant Board, Florida State University:

Under §581.12 of the statutes, the State Plant Board is a body corporate with power to contract, and has all powers of a body corporate for all purposes necessary to carry out the provisions of the Ch. 581.

Section 581.02 enumerates many powers of the State Plant Board in connection with its duties; among others, it "may rent, lease or purchase the necessary land when required" for its statutory duties.

Under the statutes, §240.11, title to property purchased by the Board of Control automatically vests in the State Board of Education. While the State Plant Board is composed of the same members who constitute the Board of Control, it is a completely separate corporation and I find nothing in the statutes, directly or by implication, which requires or permits the vesting of the title to lands acquired by the Plant Board in the State Board of Education.

It is my opinion that the title should be taken in the name of "State Plant Board, a public corporation of the State of Florida."

SOIL CONSERVATION

March 5, 1953.—053-50.

DISTRICT SOIL CONSERVATION BOARD—PERSONAL INJURY OR PROPERTY DAMAGE FROM USE OF DISTRICT MACHINERY—LIABILITY

QUESTIONS: 1. A District Soil Conservation Board owns a grader or other machinery for use in soil conservation, rents the same to farmers at an hourly charge, and the machinery is transported to the farm and returned by the farmer. The operation of the equipment is by the farmer. During such transportation or operation someone is injured or property damaged by the equipment. Are the Supervisors of the District or the District itself liable for the bodily injury or property damage?

2. May the District lawfully pay for liability insurance?

To: State Soil Conservation Board, Florida State University:

When handled in the manner described in the question, there appears to be little likelihood of liability on the part of the District or the Supervisors. However, if the machinery were defective and known to be defective by the Supervisors, or knowledge of such defects were legally chargeable to the Supervisors or the District, and injury resulted from the defects, the Supervisors might be held liable. Ordinarily the District, as an agency of the state, might claim immunity from liability for injury to the person or property, but in such cases as this where the District rents the machinery and obtains income for the use of the equipment, as it is authorized to do by Sec. 582.20 F.S., it is not at all unlikely that the court would hold the District liable to a limited extent in the event it were negligent in renting defective machinery or equipment.

In my opinion there is sufficient possibility of liability to warrant expenditure of District funds for premiums if your board should deem it wise, as a policy, to carry liability insurance in a reasonable amount.

March 4, 1953.—053-48.

STATE SOIL CONSERVATION BOARD—
ELECTIONS—SUPERVISORS

QUESTIONS: 1. Does the Soil Conservation Act require that a Supervisor be a qualified elector as defined in the Act?

2. Is it required that a Supervisor be a resident of the District?

3. Is it the duty of the board to make determinations of eligibility of voters and Supervisors?

4. May a Supervisor be elected by "write-in" votes?

To: State Soil Conservation Board, Florida State University:

In writing the Soil Conservation Act (Ch. 582, F.S.) the Legislature tried to set up a very simple plan for elections. The normal procedure for elections, as set up in the Act, is nomination of a person for Supervisor by the signatures of at least twenty-five qualified electors. Section 582.18. A qualified elector under the Act is a person qualified to vote in general elections and who, in addition, holds the legal or equitable title to any lands lying within the Soil Conservation District. Section 582.01. There is nothing in the Act defining the qualifications of a Supervisor. It is my opinion that the Act does not require the Supervisor to be a qualified elector, as defined in the Statute.

With certain specific exceptions, neither the Constitution nor the statutes directly require residence within the territorial jurisdiction served by public officers, and in some early cases our Supreme Court declined to hold residence a requisite. The Court did say that by custom and long standing an officer should reside in, or be identified with, the community which he serves. Advisory

opinion, 57 So. 351, and cases cited. Section 114.01 of the statutes provides that an office, including a district office, shall be vacant when an officer ceases to be an inhabitant of a district for which he shall have been elected or appointed. In that provision of the statute, there is at least a strong implication of legislative intent that an officer must be an inhabitant of the district which he serves. I construe the word "inhabitant" as used in the statute, to mean resident. It is my opinion that a supervisor must be a resident of the district he serves.

Whether we like it or not, the Soil Conservation Act, in its over-simplified procedure for holding elections, provides, in §582.18, that:

"The board shall pay all the expenses of such election, shall supervise the conduct thereof, shall prescribe regulations governing the conduct of such election and the determination of the eligibility of voters therein and shall publish the results thereof".

It is my opinion that your third question requires an affirmative answer.

The petition nominating a person for the office of Supervisor, is a simple informal method of proposing a suitable person or persons for the office to be voted upon by the qualified electors. Under §582.18 a qualified elector may sign several petitions nominating different persons for the office. When he votes he registers his absolute choice and his vote is a stronger indication of his preference than his signature on a nominating petition. It is my opinion that when there are more write-in votes for a person qualified to hold the office of Supervisor, than for persons nominated in the usual manner by petition, the person receiving such larger number of write-in votes is the elected officer.

LEGAL FENCES AND LIVESTOCK AT LARGE

March 11, 1954.—054-61.

LAND ENCLOSURES—TRESPASSING FOR HUNTING —PROHIBITION

QUESTION: Whether a person may be prosecuted for trespassing for hunting on the enclosure of another when the same is not posted as required by §588.10, F.S.?

To: *Hon. Karlyle Housholder, County Prosecuting Attorney, Seminole County, Sanford, Florida:*

It is my opinion that it was the clear intent of the Legislature of 1949 to classify all legally enclosed land and to set up one system for the posting of notices which would be a prerequisite to prosecution.

I believe that §§588.09 and 588.10 F.S., 1951, are directly in conflict with the second paragraph of §821.03 F.S., 1951, and that under familiar rules of statutory construction, concerning time of passage, the sections of Ch. 588 do control. I believe that this was

the effect of my opinion enumerated 050-13 a copy of which I am enclosing for your consideration. Hence, my answer is in the negative.

November 30, 1954.—054-254.

**LIVESTOCK RUNNING AT LARGE—IMPOUNDING—
UNMARKED OR UNBRANDED HOGS—
LEVY COUNTY**

QUESTION: Subsequent to the enactment of Ch. 29246, Laws of Florida, Special Acts, 1953, may unmarked or unbranded hogs running at large in hunting areas of Levy County be lawfully destroyed by any means other than prescribed in said chapter?

To: Honorable J. Frank West, County Prosecuting Attorney, Levy County, Williston, Florida:

The fact that the hogs in question are unmarked or unbranded is immaterial in effect, as the law in question applies to all hogs, the unmarked and unbranded as well as the marked and branded. Marks and brands in this instance serve only to further identify or describe such hogs.

Section 4 of Ch. 29246, Laws of Florida, Special Acts, 1953, authorizes the impounding of livestock running at large or straying by any person after due notice. Said section also makes it the duty of the Sheriff of Levy County to impound such livestock. Other sections of this chapter clearly set out the procedure to be followed in disposing of impounded livestock. This chapter provides no other means, express or implied, for controlling and disposing of such hogs running at large or straying.

Therefore, since the provisions of Ch. 29246 clearly and positively prescribe the manner for controlling and disposing of hogs running at large or straying, it is my opinion that any other manner of controlling or disposing of such hogs would be in derogation of the provisions of said chapter, unless it can be clearly established that the hogs in question are not owned by anyone and fall in the category of wild animals as distinguished from domestic livestock. Accordingly, your question is answered in the negative.

FLORIDA BOARD OF FORESTRY

December 21, 1954—054-270.

**FLORIDA BOARD OF FORESTRY—POWERS—
GAS AND OIL LEASES**

QUESTION: Does the Florida Board of Forestry have the authority and power to enter into an oil and gas lease and, if so, under what conditions and circumstances?

To: Honorable C. H. Coulter, State Forester, Tallahassee:

The Florida Board of Forestry, under §589.10, F. S., is empowered, with the concurrence of the Trustees of the Internal Improvement Fund and the Governor, to lease any lands under its jurisdiction "... when in its judgment it is advantageous to the state to do so in the interest of the highest orderly development,

improvement and management of the state forests . . ." The statute further requires that, prior to the entry into such leases, thirty days public notice must be given ". . . in the manner deemed reasonable by said board." This statute is a portion of Ch. 17027, Laws of Florida, 1935. Subsequently, the Legislature enacted Ch. 22824, Laws of Florida, 1945, which, in addition to certain designated boards, empowers ". . . all and every state board, state department or state agency of the State of Florida, having the title to any lands, submerged or unsubmerged, in the State of Florida, or the title being in the State of Florida, control and management of which are in such boards, departments, or agencies, . . . to negotiate, sell and convey leasehold estates in and to such lands, for the purpose of the development thereof, and the production therefrom, of oil and gas, . . ." The provisions of said Ch. 22824, are now contained in §§253.51-253.61, F. S.

In opinion appearing at page 635, Biennial Report of the Attorney General, 1951-1952, it was held that the Florida Board of Parks and Historic Memorials might enter into grazing leases or permits. The opinion specifically stated at the conclusion thereof that no attempt was made to pass upon the authority of that Board to grant oil, gas, mineral or other leases, pointing out that oil and gas leases for most state boards and agencies are governed by the provisions of §§253.51 et seq., F. S.

The authority to enter into oil and gas leases comes from the later enactment of the Legislature; that is to say, in 1945 and, apparently, was intended as a specific grant of power and authority to various state agencies and boards. It appears to me, therefore, that the provisions of §589.10, F.S., do not govern in the matter of oil and gas leases.

The statutes (§§253.51-253.61, F.S.) are a definite grant of legislative power to a state board such as the Florida Board of Forestry, to negotiate a lease in accordance with their terms and provisions. However, the board must first determine that in so leasing, the state forest or reforestation projects are being ". . . managed and administered by the board in the interests of the public." (§589.21, F. S.). In the event the board so concludes, the lease should be concurred in by the Trustees of the Internal Improvement Fund, and actually executed by them.

It should also be pointed out that the statutes pertaining to granting of oil and gas leases require competitive bidding (§§253.52-.54, F. S.), so it is not possible to negotiate directly with any firm or person until such requirements are met.

The Florida Board of Forestry should also be convinced from an examination of the documents evidencing the title to its lands, that there are no conditions or limitations therein, prohibiting the use of such lands for other than forest purposes. In other words, it should be determined that a contemplated oil or gas lease will not be in violation thereof, for if it would, of course, no lease should be granted.

Subject to the above observations, the question is answered in the affirmative.

BOARD OF PARKS AND HISTORIC MEMORIALS

October 22, 1953.—053-284.

MUNICIPALITIES—ZONING OF STATE PARKS

QUESTION: Are the lands or the use of the same, comprising a State Park located wholly within the boundaries of a municipality subject to municipal zoning regulations?

To: Honorable Thomas O. Berryhill, City Attorney, Fort Lauderdale, Florida:

It appears that the Florida Board of Parks and Historic Memorials operates Hugh Taylor Birch State Park located wholly within the corporate limits of Fort Lauderdale. That the Park Board has entered into a concession agreement whereby Donald R. Pierce, as licensee, will be permitted to operate a horse riding stable within Hugh Taylor Birch State Park. It is contemplated by the agreement that the licensee should erect buildings in connection with his business. The Board of Parks and Historic Memorials will receive compensation for the granting of the concession. The Park Board does not undertake to operate the stable.

For the purpose of this discussion, we are assuming the validity of the zoning ordinance in question, so that the sole proposition to be determined is whether, by reason of the riding academy being located on state property, the zoning ordinance prohibiting the operation of stables within the area, is applicable.

Our search reveals very little law which may be helpful. It was held in *City of Charleston v. Southeastern Const. Co.*, (W. Va., 1950) 64 S.E. 2d 676 that a building constructed by a state office building commission created by legislative act, was a public building and not subject to zoning regulations of the city. In *State v. Allen* (Ohio, 1952) 107 N. E. 2d 345, the Supreme Court of Ohio held that zoning ordinances were not applicable to the state or its agencies vested with the right of eminent domain in the use of land for public purposes. Hence, a state turnpike would not be invalid by passing through a zoned area. In *Jefferson County v. City of Birmingham*, 55 So. 2d 196, it was held that a county could not ignore city zoning ordinances so as to conduct and maintain a sewerage disposal plant in violation of zoning regulations. The opinion further points out that the proposed operation of the sewerage disposal plant for zoning purposes, as distinguished from tort liability, would constitute a proprietary function and the city, under its zoning power conferred by statute, could prohibit its construction and operation.

The Florida Board of Parks and Historic Memorials is created by Ch. 592, F.S., 1951. While the Board acquires property in the name of the State, it has no power of eminent domain, except by express legislative approval [§592.07(1)]. It is difficult to see how State Parks are operated and maintained in other than its proprietary capacity.

The better rule seems to be that in the Alabama case cited above, holding that there a proprietary operation offends a valid

municipal zoning ordinance the zoning ordinance will prevail. Hence, the question is answered in the affirmative.

I think it correct to add that municipal ordinances are subject always to the test of reasonableness in a proper case in a court of competent jurisdiction. Therefore, while the answer to the question is in the affirmative on the theory that prima facie the ordinance or zoning regulation is valid and reasonable it is always subject to judicial determination in a proper case where it is essentially inappropriate and unreasonable. As between a city and the State Board every effort should be made to reach satisfactory working agreements. It is believed that city zoning authorities can in most instances provide exceptions to permit appropriate park activities and concessions without discriminating against private citizens of the municipality. However, it is recognized in some areas such as those which are necessary to promote public health, sanitation and safety, that there may be no valid basis for exceptions even for state purposes.

FLORIDA CITRUS COMMISSION

March 9, 1953.—053-52.

FLORIDA CITRUS COMMISSION—STATE AGENCIES— FEDERAL TAXES—TELEPHONE BILLS EXEMPT

QUESTION: Is the Florida Citrus Commission exempt from the payment of federal taxes on its telephone bill?

To: *Honorable C. M. Gay, State Comptroller:*

The Florida Citrus Commission was created by §601.04, F.S. Its board members are appointed by the Governor and have express power to adopt certain rules and regulations which have the force and effect of law (§601.10, F.S.) (§602.12, F.S.). It is supported by state tax funds and authorized to spend state tax funds for citrus advertising, regulation and other purposes (§601.14 (2) and §601.15, F.S.).

In view of the above, it is my opinion that the Florida Citrus Commission is an agency of the state government and a part of the government of Florida and therefore entitled to the same exemption status from federal taxation as any other state governmental agency. Your question is therefore answered in the affirmative.

December 21, 1954.—054-269.

FLORIDA CITRUS COMMISSION—SEPARATE FUNDS— TAX ON CITRUS FRUITS

QUESTION: Does §601.15(7), F. S., require the Florida Citrus Commission to maintain separate funds for the revenue received from the tax on different kinds of citrus fruits?

To: *Honorable Robert Stuart, Comptroller, Florida Citrus Commission, Lakeland, Florida:*

Section 601.15(7), F. S., provides:

"... the money levied and collected ... shall be used ... in such equitable manner and proration as the commission may determine taking into consideration the pro rata payments made on various varieties and any other relevant and pertinent factors"

According to the report on the Citrus Commission made by the State Auditor as of June 30, 1953, the following procedure is now followed by the Commission:

"The advertising program prepared by the Commission is based upon anticipated receipts, and takes into consideration the relative amounts of revenue received from the various citrus fruits, both fresh and processed.

"In the distribution of consumer advertising expenditures, the Commission first accumulates expenditures through the year by media. At the end of the year a subclassification is made by individual citrus fruits and combined ads. The cost of combined ads is then distributed to individual citrus fruits on the same ratio as receipts for the year. Distribution for each citrus fruit between fresh and canned is then further prorated on the basis of receipts for the year. Media preparation costs are distributed on the basis of cost of media space."

In my opinion, the Legislature has given the Commission discretionary authority to determine the procedure to be followed in using the funds in question for the benefit of the Florida citrus industry in general and for the specific benefit of the types of citrus fruit taxed for advertising purposes on a pro rata basis according to the amount of tax revenue yielded by the various varieties of fruit.

It would appear that the procedure now being followed by the Commission as outlined in the Auditor's Report, is reasonable in every respect and complies with the intent of the law. I do not believe that it would be necessary to maintain separate funds for each variety of citrus fruit in view of the fact that the method now used by the Commission would appear to assure each variety of citrus a fair proportion of advertising benefits.

Your question, in view of the above observations and conditioned upon the specific factual situation involved, is answered in the negative.

CHAPTER XXXIV

CORPORATIONS AND BUSINESS TRUSTS

CORPORATIONS, GENERAL PROVISIONS

August 31, 1953.—053-219.

TAXATION—CORPORATIONS—REPORTS—§608.32, F.S., 1953

QUESTION: Was §610.07, F.S., as amended by Ch. 28248, Laws of Florida, Acts of 1953, in any way affected by §608.32, F.S., as adopted by Ch. 28170, Laws of Florida, Acts of 1953?

To: *Honorable R. A. Gray, Secretary of State:*

Ch. 28248, Laws of Florida, Acts of 1953, amended §610.07 and other sections of Florida Statutes, 1951, "by prescribing the effective date of information contained in said tax reports; deleting limitations on proration of tax; and requiring all corporations paying tax to file reports." (See title to act). Ch. 28170, Laws of Florida, Acts of 1953, revised and consolidated portions of Chapters 610, 611 and 612, F.S., added a new chapter known and designated as Ch. 608, F.S., and repealed a large portion of said Chapters 610, 611 and 612. This chapter was clearly intended as a revision of the existing corporate laws contained in said Chapters 610, 611 and 612.

It is clear that §608.32, F.S., as adopted by said Ch. 28170, requires the filing of annual reports by all corporations doing business in this state, including railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative associations, corporations not for profit and corporations paying the maximum tax, although such corporations are not required to pay the tax levied by §608.33. All such corporations are exempted under §610.07, F.S., not only from paying the tax but also from filing any return. To this extent the two statutes appear to be in conflict. Because of this conflict, we are required to determine which is the controlling law.

Ch. 28170 was passed by the House on May 22, 1953, by the Senate on May 29, 1953, and was filed in the office of the Secretary of State on June 15, 1953, having become a law without the approval of the Governor. Chapter 28248 was passed by the Senate on May 21, 1953, by the House on June 5, 1953, and filed in the office of the Secretary of State on June 15, 1953, having become a law without the approval of the Governor. The said chapters became laws at the same moment of time under and by virtue of §28, Art. III, of the State Constitution.

Ch. 28170, being a general revision of the statute law of this state relative to business and other corporations, the new section in said Ch. 28170, known and designated as 608.32, was evidently intended to take the place of and replace §610.07.

"It is a familiar and well settled rule that a subsequent statute, revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied. This is true even though the subsequent statute contains no express words of repeal and is not repugnant to the former statute". (59 C.J. 921, §521.) "The fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions ... to the intention or purpose of the legislature as expressed in the statute." (59 C.J. 948, §568.) Where two acts became laws on the same day, "in the absence of evidence as to which act is the latest the statute that is the clearest expression of the legislative intent will prevail". (1 Sutherland Statutory Construction, 3rd Ed. 276, §1609).

In the light of the above and foregoing observations, authorities and circumstances, we feel that the Legislature intended to substitute new §608.32 for and in lieu of old §610.07, including any 1953 amendments thereto. The above question is answered by stating that in our opinion §610.07, F.S., as amended by Ch. 28248, Laws of Florida, Acts of 1953, has been repealed, and should not be recognized by you.

CORPORATIONS FOR PROFIT, GENERALLY

September 18, 1953.—053-246.

CORPORATIONS—DEBENTURE PREFERENCE STOCK —ANNUAL REPORT—FILING FEES

QUESTION: Is the "debenture preference stock" of a domestic corporation re-incorporated under the provisions of Ch. 612, F.S., as hereinafter described, preferred stock of said corporation with respect to which annual reports and filing fees must be made and paid to the Secretary of State?

To: *Honorable R. A. Gray, Secretary of State:*

The extensive amendment and revision of our corporation laws at the 1953 session is recognized; however, we are here concerned with the July 1, 1953, annual report of a corporation, and the laws now and heretofore existing relevant to the question are here applicable. Since we here deal with "Articles of Re-Incorporation" of a corporation, it is assumed that the corporation re-incorporated under §612.64, and this opinion is conditioned upon such assumption.

A statement of assets and liabilities of such corporation which accompanied the request for opinion evidences "Capital" consisting of "Debenture Preference" in the amount of \$30,000, and "Common" in the amount of \$10,000; and there is shown capital surplus of \$5,500.00. It is urged that the \$30,000 par value debenture preference stock "is same as bonds", hence that it is not in reality preferred stock of the corporation to be included and considered in

connection with such annual report and fees. Relevant portions of the "Articles of Re-Incorporation" of the corporation, filed with the Secretary of State on April 11, 1941, are quoted:

"The shares of the capital stock of the Corporation shall be divided into classes and kinds as follows:

"a. One hundred and fifty shares of common stock without par or nominal value.

"b. Three hundred and fifty shares of Debenture Preference stock of the par value of \$100.00 per share."

* * * * *

"The relative rights, preferences, limitations and restrictions of each class of stock shall be as follows:

"a. The holders of the Debenture Preference Stock shall be entitled to cumulative interest at the rate of 8% per annum, payable quarter-annually beginning July 1, 1941, before any dividends are paid on the common stock, and the common stock shall be entitled to all dividends declared by the Board of Directors in excess of the said 8% of the shares of Debenture Preference Stock.

"b. In the event of the dissolution of the Corporation or distribution of the assets, the Debenture Preference Stock outstanding at that time shall be paid at par, plus all accumulated unpaid interest, and the remainder of the corporate assets shall be divided ratably among the holders of the common stock. The voting power at any stockholders' meeting shall be confined exclusively to holders of the common stock. The Corporation shall reserve the right to redeem any number or all of the certificates of Debenture Preference Stock at \$102.00 per share at any time after December 31, 1942. The said Corporation shall be bound to redeem on or before January 1, 1961, all of the Debenture Preference Stock outstanding. Failure of said Corporation for a period of two years to pay any quarter annual interest thereon, as same becomes due and payable, shall render the Corporation in default as to such payment and entitle the owners of certificates as to which delinquency occurs to declare the principal amounts of such certificates due and to institute action against the Corporation for the par value of said certificates and the accumulated interest thereon. Failure of said Corporation to retire the Debenture Preference Stock on or before January 1, 1961, shall render the Corporation in default as to such payment and entitle the owners of certificates to declare the principal amounts of such certificates due, and to institute action against the Corporation for the par value of said certificates and the accumulated interest thereon. The rights of the holders of Debenture Preference Stock shall, however, be limited in the following respects: In the payment of their several claims, all general creditors shall rank superior to the holders of Debenture Preference

Stock, but all holders of Debenture Preference Stock shall rank pari-passu with each other and superior to the holders of any other class of stock of the Corporation; the common stock to be entitled to all the dividends after the interest has been paid on the Debenture Preference Stock in amount to be declared by the Board of Directors, and all votes to be vested in said common stock. In the event of liquidation, said common stock shall be paid all excess after the payment of all general creditors and the retirement, plus accrued interest, of all Debenture Preference Stock outstanding..."

A preferred stockholder cannot be both creditor and debtor by virtue of his ownership of stock. *Hazel Atlas Glass Co. vs. Van Dyk & Reeves, C.C.A. N.Y. 8 F. 2d 716*. Subject to state laws, it is recognized that so-called preferred stock may be issued under such circumstances as to create a mere money-borrowing transaction, in which event certificates thereof are evidences of indebtedness and holders thereof are creditors of the corporation similar to bondholders. Thus, it was held in *Oklahoma Wheat Pool Elevator Corporation vs. Bouquot, Okla. 68 P. 2d. 97*, that a so-called certificate holder of nonvoting and nonassessable preferred stock paying 7% annual dividend and providing for redemption on demand 30 days prior to a designated date of any calendar year, was a creditor and not a stockholder. To like effect, see *Best vs. Oklahoma Mill Co., Okla. 253 P. 1005*; *Wright vs. Johnson, Ia., 167 N.W. 680*; and generally see 18 C.J.S. 655, Section 228. In each of these is found the principle that the name given to such a certificate is not controlling.

However, state laws applicable and the legal intention with respect to the real nature of such preferred stock, ascertained from the entire transaction, are the determining factors. *Hazel Atlas Glass Co. vs. Van Dyk & Reeves, supra*. Thus we find in 18 C.J.S. 655-657, §228:

"...if the instrument executed by a corporation has every essential feature of a certificate of preferred stock and is issued in the usual form of such stock, it is a certificate of preferred stock and not a contract for the payment of money, although it may provide for redemption by the corporation by a certain time or on certain conditions, and in such case the holders are stockholders and not creditors until a change is made. In such a case the instrument is not necessarily a contract of indebtedness, nor a certificate of preferred stock only, because it is secured by a mortgage or other lien, since such a mortgage or lien may operate against the common stockholders only and not against creditors; nor because the holders are deprived of the right to vote at corporate meetings..."

Further, sound argument can be made that this preferred stock was and is authorized by relevant provisions of Ch. 612, F.S.

Section 612.09, F.S., as originally adopted and as it was in force in 1941, provided that shares of stock "may be divided into

classes having such distinguishing characteristics, including designations, preferences, voting powers or restrictions or qualifications of voting powers and may be subject to such rights of redemption reserved to the corporation as may be stated in such certificates of incorporation or amendment..."

Section 612.21, F.S., provides, in part, that the capital of a corporation incorporated or re-incorporated under Ch. 612 shall be the sum of the aggregate par value of all shares of stock having par value issued by the corporation and the aggregate amount of consideration received by the corporation for the issuance of additional shares without par value, together with such additional amounts, if any, as from time to time by resolution of the board of directors may be transferred to capital. At this point, it is pertinent to note that the preferred stock forms part of the capital stock of the corporation, and that the consideration therefor properly constitutes a part of the capital of the corporation. Such is the intent of said §612.21; and the principle is also announced in *Armstrong vs. Union Trust & Savings Bank, Wash.*, 248 F. 268; *Kistler vs. Caldwell Cotton Mills Co., N.C.*, 172 S.E. 373; *Best vs. Oklahoma Mill Co.*, *supra*.

Under the Articles of Re-Incorporation filed by this corporation, the debenture preference stock was specifically designated as a part of the corporation's capital stock, and the consideration received therefor is treated as a part of the capital of said corporation, as evidenced by the aforesaid financial statement. It is recognized that when this stock is retired, there will result a reduction in capital; but provision for redemption is permitted by said §612.09, and other provisions for reduction of capital as set forth in §612.22, F.S., are not to be urged as impairing the right of redemption permitted by the former section. Furthermore, if any provisions of the Articles of Re-Incorporation pertaining to issuance, interest payable upon, and redemption of this stock offend any of the law set forth in Ch. 612, F.S., the provisions of such Articles must yield to the controlling law. *Hazel Atlas Glass Co. vs. Van Dyk & Reeves*, *supra*.

The fact that the dividends payable with respect to this stock is referred to as "interest" is immaterial. *Hamlin vs. Toledo, St. Louis & Kansas R. Co.*, 78 F. 664, 24 C.C.A. 271.

In view of the foregoing, in my opinion the above question is answered as follows:

It is recognized that certain doubt exists concerning the nature of this debenture preference stock. However, unless and until the courts shall rule otherwise, it is the position of this office that said stock is preferred stock of said corporation. Hence, such stock should be included in the corporation's annual reports to the Secretary of State and the required filing fees with respect thereto should be paid to said official.

CHAPTER XXXV

INSURANCE

INSURANCE COMMISSIONER

February 25, 1954.—054-48.

INSURANCE—HIALEAH SHOPMEN'S RELIEF CLUB

QUESTION: Does the functioning of an organization, as described below, constitute the business of insurance?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

The plan of the Hialeah Shopmen's Relief Club is set forth in what is generally recognized as a "charter," and is so referred to herein.

While there is no specific showing in the request for opinion or charter, from certain wording in the latter it would seem apparent that the organization is to be composed of railroad employees, and such is here assumed. It is further assumed that such proposed members are all employees of the same employer. This opinion is conditioned upon such assumption.

The purpose of the organization is stated in the preamble of the charter as follows:

"The purpose of this club is to discourage the circulation of relief petitions and to provide a plan to enable a member to help and be helped on an equal basis with his or her fellow employees."

Article II of the charter provides in more specific detail that the purpose of the organization is to help relieve financial loss due to illness or injury to any one of its members, except with respect to certain illnesses and injuries.

Other relevant features of the charter are mentioned. Provision is made for election of officers and a board of directors, and their duties are prescribed. Subject to certain conditions, benefits payable to a sick or injured member amount to \$5.00 a day "for each assigned work day lost commencing with the 6th regular assigned work day" and "will be paid weekly and not to exceed a period of 26 weeks in any 12 month period." The initiation fee is \$5.00; and dues required of each member is \$1.00 a month until the amount in the treasury reaches \$1,000.00, such dues to then cease until said amount shall reach \$750.00, then payment of such dues to be resumed until said amount shall again reach the sum of \$1,000.00. Provision is made for a reinstatement fee required of a lapsed member.

From time to time this office has been called upon to determine

if a plan of operation or contract constituted the business of insurance or an insurance contract. Reference is made to certain of these: Opinion 052-124 (1951-52 Biennial Report, 644); Opinion 052-294 (1951-52 Biennial Report, 651); Opinion 052-222 (1951-52 Biennial Report, 680); Opinion 053-49; and Opinion 053-107.

In all of these mentioned opinions, it will be noted that the question turned upon whether there was involved an insurable risk with respect to which some person was indemnified upon the happening of a contingency. A clear definition of what constitutes an insurance contract, hence the business of insurance, is quoted from *State vs. DeWitt C. Jones Co., Fla.*, 147 So. 230, wherein the Court referred to a contract of insurance as one "whereby, for an agreed premium, one party undertakes to compensate another for loss on a specified subject by specified perils." In that case the Court differentiated between the plan of operation therein dealt with and certain philanthropic and charitable associations, such as employees' relief departments of business organizations.

We dealt with such a relief association in mentioned opinion 053-49. Generally for distinctive characteristics of such an association see: Couch on Insurance, Vol. 1, Section 23; Commonwealth vs. Equitable Ben. Asso., Pa., 18 A. 1112; Wolfstern vs. R. R. Relief Department, N.J., 74 A. 533; Burlington Relief Dept. vs. White, Neb., 59 N.W. 747. The proposed organization contemplated by this question appears to fall within the category of relief associations of employees, subject to the conditions mentioned below.

The question is answered as follows:

The activation of this plan for a relief club will not constitute the business of insurance, hence will not violate any laws of Florida relating to insurance, subject to the following being provided and observed:

(1) That the plan is a voluntary one in so far as the individual employees are concerned. A reading of the charter indicates this to be true; however, it would be well specifically to mention it.

(2) That benefits payable to a member are payable as an incident of his or her membership and not as result of any contract issued by the organization to a member. Hence, it would be well to express this specifically in the charter.

(3) That specifically the charter provide that the organization will be liable for payment of benefits only to the extent of funds available or to become available in its treasury for that purpose.

It is mentioned that use of the word "club" in the name of this proposed organization does not appear to violate §610.33, F.S., since the organization here is not for profit. The point is mentioned to preclude possible future speculation concerning it.

June 17, 1954.—054-148.

INSURANCE—SECURITIES—ELIGIBILITY UNDER
§626.05, F.S.

QUESTION: Are the following described securities county bonds within the contemplation of §626.05, F.S.?

(1) \$40,000 of Duval County, Special Tax School District #1 bonds; and

(2) \$10,000 of Dade County Hospital bonds?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Subsequent to the receipt of the above request for opinion we were advised by the Insurance Department: (1) That the mentioned \$40,000 of Duval County Special Tax School District #1 bonds were issued subsequent to the date that the boundaries of said school district and Duval County became co-extensive, and that such bonds are obligations of the District as it now exists. (2) That the Dade County Hospital bonds are general obligation bonds issued by that county. This opinion is conditioned upon such representations.

The first paragraph of §626.05, F.S., is quoted:

"No foreign insurer, unless otherwise expressly provided, nor any agent or representative thereof, shall transact any insurance business in this state, unless such insurer be possessed of assets worth at least two hundred fifty thousand dollars, invested in bonds of the United States, of any state or of any county or municipality in the United States, or in mortgages or deeds of trust on improved and unencumbered real estate, worth not less than fifty per cent more than the amount loaned thereon, at market value."

Research on the question of what constitutes a "county bond" results in the finding of but one case upon the subject. In the Indiana case of *Forrey vs. Board of Commissioners of Madison County*, 126 N.E. 673, a certain law known as "The County Unit Road Law" was challenged on constitutional grounds, one of the grounds being that whereas in the title it appeared that provision was made for issuance of "county bonds", in the body of the act it appeared that the bonds were to be issued by county authorities for a special taxing district whose boundaries were coextensive with the boundaries of the county. The court held in effect that the words "county bonds" were broad enough to include all bonds issued by county officials to be paid for by levy on property in a special taxing district whether the boundaries of the district were coextensive with the county or not.

Examination of §§236.37 to 236.53, F.S., both inclusive, will evidence that bonds issued in pursuance thereof by a special tax school district whose boundaries are coextensive with the boundaries of the county are as collectible and backed by the same taxing

power and resources as are county bonds issued in pursuance of Art. IX, §6, Florida Consti., and relevant statutes. Thus while technically a special tax school district bond is a "district" as distinguished from a "county" bond, reasonably the special tax school district bonds described in the question fall within the intent and purpose of said §626.05, and are, for the purposes of said statute, county bonds.

In view of the foregoing, in my opinion the question is to be answered in the affirmative as to the two classes of bonds described; that is to say, that the special tax school district bonds and the county hospital bonds as described, are county bonds within the meaning and intent of said §626.05.

November 18, 1953.—053-313.

CARE CONTRACTS—CHURCH SUPPORTED HOME FOR THE AGED

QUESTION: Some years ago a member church of The Methodist Church (national organization) in a Florida city, as a part of its religious program, established a home for the aged. For convenience, a nonprofit corporation, operating within such religious program, was organized to manage such activity. Aged persons are admitted to such home, which supplies them with board and lodging for life, for a sum considered necessary, based upon an experienced estimate of expense requirements and life expectancy of the applicant according to a recognized mortality table. During the years the activity has been so conducted, it has experienced no deficit. However, should a deficit ever occur, not corrected by the member church, The Methodist Church would supplement the funds of the home to the extent of such deficit. Are the activities of said nonprofit corporation such as to bring it within the purview of Ch. 28190, Laws of 1953?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Chapter 28190 comprehensively regulates agreements between persons (including firms and corporations) and individuals for maintenance or personal care by the former of the latter for a period of years or life, as defined and set forth in said act. Also subject to the act is the owner or operator of an establishment (nursing home) licensed under the provisions of Ch. 400, F.S., (Ch. 28140, Laws of 1953) providing "care", as such word is defined in Ch. 28190, and under the prescribed circumstances. There are no specific exceptions in Ch. 28190; however, among other exceptions in Ch. 28140 are the following: "that the old peoples home known as 'Moosehaven', owned and operated by The Loyal Order of Moose, a national fraternal organization, located at Orange Park, Florida, be exempted from the provisions of this act; provided further that this Act shall not be applicable to old age homes owned and maintained by any national fraternal organization, which has been in existence for a period of more than twenty-five years." Thus, it is to be observed that in neither Ch. 28140 nor 28190 is there an exemption covering a "care" home as contemplated by

the above question. Hence, the question is to find its answer in the intent and meaning of Ch. 28190.

In our recent opinion 053-291 of October 27, 1953, we described in detail the main features of Ch. 28190, and reference is made to that opinion. We now add to those details the following features here relevant:

Subsections 1(3) and (4) of Ch. 28190 are quoted:

"(3) 'Care' means furnishing to an individual, not related by consanguinity or affinity to a person furnishing same, shelter, food, clothing, drugs, medicine, medical attention, entertainment, or other personal advantage or attention, either one or more, for a term of years or for life.

"(4) 'Person' means the owner or operator, whether a natural person or a firm or corporation, of a private home, institution, building, residence or other place, whether operated for profit or not, who undertakes to provide care for a period of one or more years or for life, for a fixed fee for the period of such care, payable either in a lump sum or in installments; or the owner or operator of an establishment licensed under the provisions of Chs. 400 or 611, F.S., who undertakes to provide care for a fixed fee, for the period of such care, payable either in a lump sum or in installments."

Section 2 of Ch. 28190 is quoted:

"Legislative Determination.—It is hereby determined by the Legislature, that the execution of care agreements for life or for a term of years and the *business* of those who engage by contract to furnish such care, are matters charged with a public interest; that heretofore abuses have been practiced in relation to the execution of said agreements, acquisition of property as consideration therefor, and the conduct of such *business*; that such persons presently engaged in such *business* in this state and those who may engage in said *business*, and such *businesses*, should be regulated, and that this Act which regulates such persons and *businesses* is a valid exercise of the police power of Florida in relation thereto." (Emphasis supplied.)

Attention is now directed to certain principles of statutory construction here relevant:

It is elementary that the intent of a statute is the law. *State vs. Patterson, Fla.*, 65 So. 659; *Davis vs. Florida Power Co., Fla.*, 60 So. 759. Courts must be guided by legislative intent notwithstanding it may appear to contradict the strict letter of the statute, and no literal interpretation should be given which leads to unreasonable or absurd consequences or results. *State vs. Wentworth, Fla.*, 185 So. 357; *Simmons vs. State, Fla.*, 36 So. 2d 207; *Smith vs. Ryan, Fla.*, 39 So. 281, *Foley vs. State ex rel Gordon, Fla.*, 50 So. 2d 175.

Further, we pointed out in said opinion 053-291 that Ch. 28190 is an exercise of the police power. That power is the exercise of the sovereign power of the state to enact laws for the protection of lives, health, morals, comfort and general welfare. *State ex rel Municipal Bond & Investment Co. vs. Knott, Fla.*, 154 So. 143. All personal and property rights are held subject to the police power and neither provisions of State nor Federal Constitutions relative to freedom of property or contract will interfere with the lawful exercise of that power. *Mayo vs. Polk County, Fla.*, 169 So. 141, appeal dismissed *Polk Co. vs. Mayo*, 299 U. S. 507, 81 L. Ed. 376. See also *Home Building & Loan Association vs. Blaisdell*, 290 U. S. 398, 78 L. Ed., 413; *State of Indiana ex rel Anderson vs. Brand*, 303 U. S. 95, 82 L. Ed. 586; *Southern Utilities Co. vs. City of Palatka*, 99 So. 236, 268 U. S. 232, 69 L. Ed. 930. The validity of a police regulation must depend upon whether under all circumstances the regulation is reasonable or arbitrary and whether it is reasonably designed to accomplish a purpose falling within the scope of the regulation. *Knowles vs. Central Allapattae Properties, Fla.*, 198 So. 819. A police regulation must be reasonable and bear some substantial relation to public health, safety, peace, morals, or welfare. *Nelson vs. State ex rel Gross, Fla.*, 26 So. 2d 60.

With these legal principles in mind, we revert to the purpose of Ch. 28190 and certain significant wording thereof.

It is to be observed in above-quoted subsection 1 (4) of the chapter that "person", as used in the act, means the owner or operator, whether a natural person, firm or corporation, of a private home, institution, building, residence or other place, whether operated for profit or not, "who undertakes to provide care for a period of one or more years or for life, for a fixed fee..." We do not construe that a recognized nationally organized church, as here found, operating through one of its member churches a home for the aged as a part of the religious program of such member church, even though within said program the activity is in charge of a nonprofit corporation, is a "natural person, firm or corporation," as such words are used in said definition. Further, even though the solvent operation of said home requires adherence to estimated expenses and an actuarial table and the payment of a consideration based thereon, such consideration is not a "fixed fee", within the meaning of such definition, since the Church (national organization) would if necessary supplement the home's funds to the extent of any deficit which might occur.

Further, attention is directed to §2 of Ch. 28190, quoted above, and the underscored words "business" and "businesses" used therein. We do not construe the religious program of this nationally organized, recognized and functioning church, backed by the resources of its benevolent funds, as a "business" within the contemplation of said term as employed in §2 of the act.

Further, it is to be observed from a study of the above cases and others relating to exercise of the police power that where there exists, in relation to public welfare, an evil in any given field of endeavor, the state, in coping with that situation, may be

forced to include in regulatory legislation activities in that field not inimical to public welfare. However, reasonably it does not appear that this regulatory act was intended to control the activity involved in the above question.

To avoid confusion hereafter, a distinction is to be drawn between the activities of a church, as here described, and of an individual member or members thereof engaged in the business of furnishing care as contemplated by Ch. 28190, dissociated from a program of a church, supported if necessary by the resources of the church.

Hence, for the foregoing reasons, the above question is answered in the negative.

January 24, 1954.—054-14.

ALIEN INSURER—VOLUNTARY DEPOSIT—TRANSFER TO
SUPERINTENDENT OF INSURANCE, NEW YORK

QUESTION: Where an alien fire and casualty insurance company qualified in Florida in pursuance of Ch. 28189, Laws of 1953, and in error made a voluntary deposit of securities (approximate value, \$270,000) with the Insurance Commissioner of Florida, properly may such Insurance Commissioner, upon directions of such insurer, deliver such deposit to the Superintendent of Insurance of the State of New York to accomplish the purpose originally intended by such voluntary deposit?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

The following facts are assumed: (1) That this alien company, Swiss National Insurance Company, Ltd., has qualified in this State, as its state of entry, in pursuance of and as contemplated by Ch. 28189, Laws of Florida, 1953. (2) That this voluntary deposit was made for the purpose of qualifying the company in the State of New York. (3) That the deposit will be received and held by the Superintendent of Insurance of the State of New York for the benefit of all policy holders of this alien company in the United States. (4) That this alien insurer, in connection with its engaging in business in this state as its state of entry, shall have trusted assets in this state in the amount of the character and as provided by relevant provisions of said Ch. 28189, after transfer of said voluntary deposit. This opinion is conditioned upon such assumptions.

The mentioned assumptions are not arbitrary, but derive from representations of representatives of this insurer or of the Insurance Department of Florida. Whether such assumptions are correct may be readily ascertained by the Insurance Commissioner.

The provisions of §626.25, F.S., relating to voluntary deposits by certain fire, casualty and title insurers, present no impediment to the transfer of these funds; nor does any former construction of said section apply to the facts and circumstances assumed here to exist as above set forth.

In view of the foregoing, in my opinion, the question is answered as follows:

Conditioned as above set forth, the Insurance Commissioner of Florida is authorized to transfer, upon direction of this alien insurer, to the Superintendent of Insurance of the State of New York, the securities constituting the voluntary deposit of this insurer with said Commissioner, of the approximate value of \$270,000.

April 13, 1954.—054-85.

INSURANCE—FOREIGN INSURER—REGIONAL HOME
OFFICE—REQUIREMENTS—CH. 27989,
ACTS 1953; §205.432, F.S.

QUESTION: Foreign insurance company "A" is wholly owned by foreign insurance company "B", and both are authorized to engage in business in this state. Would insurance company "A", if otherwise complying with the provisions of Ch. 27989, Laws of Florida, 1953, be entitled to the benefits of such act if it purported to establish a "regional home office" in a building owned in this state by company "B"?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Chapter 27989 adds to Florida Statutes a new section designated as §205.432, which section provides for establishment in this State of regional home offices by foreign insurance companies, according to the requirements and standards fixed in the act.

The following is quoted from §205.432(1):

"A foreign insurance company incorporated by or under the laws of any other state or foreign company, which is subject to the tax imposed by subsection (2) of §205.43, F.S., and which owns and substantially occupies any building in the State of Florida as a regional home office, as hereinafter defined, shall be entitled to the following credits and deductions against such tax:..."

There is the well-known rule that statutes imposing taxes are to be strictly construed in favor of the taxpayer and against the taxing power. E.G., *Mosely vs. Tift*, 4 Fla. 402; *A.C.L. R. Co. vs. Amos*, Fla., 115 So. 315; *Florida National Bank of Jacksonville vs. Simpson*, Fla., 59 So. 2d 751. On the other hand, exemptions from taxation, "whether stated in the Constitution or in statutes, are to be construed against the claimant and in favor of the taxing power in cases of doubt. *Rast vs. Hulvey*, Fla., 80 So. 750." *Steuart vs. State*, Fla., 161 So. 378, and see also *Lummus vs. Florida Adirondack School*, Fla., 168 So. 232.

In my opinion the above question properly is answered in the negative; that is to say, that company "A" may establish a "regional home office" in this state, as contemplated by Ch. 27989, Laws of Florida, 1953, only in a building owned and substantially occupied by it. This conclusion derives from the fact that regardless of the ownership of company "A" by company "B", the former

is a distinct legal entity; and, further, if any doubt exists (which is not apparent) the above rule relating to tax exemption statutes is applicable.

May 14, 1954.—054-118.

FOREIGN MUTUAL INSURANCE CORPORATION—
INVESTMENTS ONLY—ADMISSION—
REQUIREMENTS

QUESTIONS: 1. If a foreign mutual insurance corporation intends to make investments in this state but will not do an insurance business in this state, must it comply with the requirements of the regulatory laws pertaining to the admission of foreign insurance corporations?

2. When a foreign mutual corporation is admitted to do business in this state, may the Secretary of State impose on the corporation a charter tax based on the assets which the corporation intends to employ in the state?

To: Honorable R. A. Gray, Secretary of State:

Although §626.02, F.S., in sweeping language prohibits a foreign insurer from assuming risks or *transacting any business in this state* without having obtained permission, it has been the administrative construction of the Insurance Commissioner for some time that this language, when read in context, means only that transactions of what is generally recognized as insurance business can not be undertaken without the approval of the Commissioner. All of the regulatory provisions of the insurance law of this state are directed in one way or another toward the protection of policy holders of companies operating in this state, and they are not intended to affect the activities of foreign corporations that do not do an insurance business in Florida. Although investments made by a foreign insurer in this state may have an indirect connection with an insurance business carried on in another state, the Florida insurance Laws are not intended to regulate the making of such investments unless the company is selling policies in and to the citizens of this state and is thereby conducting an insurance business in Florida.

In regard to the second question, reference is made to §613.01, F.S., which reads in part as follows:

“No foreign corporation shall transact business, or acquire, hold or dispose of property in this state until it shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, and shall have received from him a permit to transact business in this state;...”

It is further provided in §613.02 that:

“... In every case where application is made to the secretary of state for the issuance of a permit under this section, the secretary of state shall demand and receive

from the applicant, for the use of the state, a fee calculated upon the basis of the total authorized capital stock of the corporation, as shown by its charter, unless the applicant shall make it appear by such affidavit and other satisfactory evidence as the secretary of state may require to be submitted to him that the amount of capital of such foreign corporation employed, or to be employed, in the State of Florida, is less than the total amount of authorized capital stock shown by the charter of such foreign corporation,..."

Since the amount demanded to be paid under the last quoted statute is based on the total authorized capital stock of the foreign corporation (unless the amount of capital of the corporation which is or will be employed in Florida, when used as a basis, would result in a lesser figure); and since mutual insurance corporations have no capital stock upon which the Secretary of State could base his computation of the amount of tax that should be demanded of such a corporation; the Secretary of State has long adopted the practice of demanding only the payment of the five dollar filing fee (authorized by §613.02) from foreign mutual insurance corporations. In view of this administrative interpretation of such long standing, it is not deemed necessary to labor this point further. The fact that the company in question, although a mutual insurance company, is not going to conduct an insurance business in this state, and will limit its activities to making investments, should not affect the Secretary of State's construction of the Foreign Corporation Law.

Upon consideration of the foregoing it is my opinion that your questions should be answered as follows:

1. Since there is no apparent reason why the Insurance Commissioner should require the company in question to comply with the insurance regulations which would seem to apply to it only if it were going to engage in an insurance business in Florida, and since the Commissioner could require such compliance at any time the company might undertake an insurance business in this state, the Secretary of State may issue the requested permit to the foreign mutual company upon the receipt from it of the five dollar filing fee and a duly authenticated copy of its charter.

2. Since a foreign mutual insurance company has no capital stock which could be used as a basis for determining the amount of charter tax which it should pay under §613.02, F.S., and since the Secretary of State has long followed the practice of not demanding such a tax from foreign mutual insurance companies, the company in question would not have to pay such tax and may be issued a permit when it has complied with all other laws applicable to the admission of foreign corporations.

October 13, 1953.—053-270.

INSURANCE LAWS—PROPOSED BENEFIT PROGRAM IN RELATION TO

QUESTION: Does a proposed benefit program, as described

below, constitute the business of insurance within the contemplation of the insurance regulatory laws of this state?

To: Honorable J. Edwin Larson, Insurance Commissioner, Tallahassee:

The proposed benefit program is to be administered by a board of benefit trustees, such officials to be elected for stated periods of years from the membership at large. Upon death of a member of the program, the trustees shall pay to the surviving widow or children or other dependents of the decedent the sum of \$2500. The members of the program shall have no vested rights to the funds from which such benefits are paid. Membership in the program as now proposed is limited to "firms" (individuals, partnerships, corporations) engaged in a particular type of business, it now being proposed that a person entitled to participate in the benefit plan may be an individual, the member of a partnership or stockholder in a corporation actively engaged in the operation or management of member business concerns. The funds of the program are derived from contributions promised to be made as a prerequisite of membership, the amount of such contributions being based upon the volume of business "done by the individual member firm from month to month". No policy, certificate or contract will be issued or required in administering the program. The proposed benefits are not an enticement or inducement for acquiring new members. Provision is made for termination of the program by the members, in the manner set forth.

The question of whether a program or plan of the general nature here found constitutes the business of insurance is a recurring one.

The term "insurance" may be said to be an agreement whereby, for a premium or other compensation, one party undertakes to compensate another party, or his nominee, for loss on a specified subject when caused by specified perils. *State v. DeWitt C. Jones Co., Fla., 147 So. 230*. Generally on this subject of insurance, see *Anno. in 63 A.L.R. 712, et seq.; 100 A.L.R. 1449 and 119 A.L.R. 1241; 21 Words and Phrases, "Insurance", 723 et seq.; 44 C.J.S. 471, Section 1; Blacks Law Dictionary, 3rd Ed. 989*.

While it is true that by action of the members of the program, as provided, the program may be discontinued at any time, it appears that when rights have accrued under the program for the benefit of any beneficiary of a member, it is an enforceable right and no discontinuance of the program after the accrual of the right could cancel it. Hence, the fact that there is no policy or certificate issued in connection with the benefit coverage proposed to be provided, does not vary the fact that when the program is put into operation contractual rights are created as between the members of the program.

Employees' benefit and relief associations are generally recognized as not constituting the business of insurance. Generally on this point see *Couch on Insurance, Vol. 1, §23; Commonwealth v. Equitable Ben. Assoc., Pa., 18 A. 1112; Wolfstern v. Pr. Relief Dept., N. J., 74 A. 533; Burlington Relief Dept. v. White, Neb.,*

59 N.W. 747, and *Eckman v. Chicago S. & Q. R. Co.*, 64 Ill. App. 444. However, the program here considered is to be differentiated from employees' benefit and relief associations here mentioned.

In view of the foregoing, in my opinion the above question is answered as follows:

The above proposed plan if put in operation would constitute the business of insurance; and, hence, such plan so operating would be subject to the relevant regulatory insurance laws of this state.

January 29, 1953.—053-16.

MORTGAGED PROPERTY—INSURANCE COVERAGE— CONTROL BY MORTGAGE

QUESTION: A mortgagor agrees in the mortgage executed by him to maintain described insurance coverage on the mortgaged property, and that, "All insurance shall be carried in companies approved by Mortgagee..." The mortgagee has placed such mortgage with a mortgage company to service same for him. The mortgage company has obtained the insurance coverage required by the mortgage and in effect has refused to accept a policy of insurance obtained by the mortgagor. The mortgagee has notified the mortgagor in writing that it is the mortgagee's desire that the mortgage company "place this (insurance) business". Under the circumstances mentioned, may the mortgagee control the placing of the insurance required by the mortgage?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Certain provisions of the mentioned letter from the mortgagee to the mortgagor are worthy of note, as follows:

"... I prefer that you let (the mortgage company) place this business inasmuch as they have your escrow account and pay taxes and service this mortgage for me.

"I have found by experience that mortgage companies can assist in claim service in the event of loss when they have placed the business.

"I have the privilege under the mortgage to approve the company writing the insurance and I prefer that you authorize the (named insurance company's policy) issued by the (named agency) to remain in force. Please sign and return if this meets with your approval in the enclosed envelope."

For reasons set forth below, no attempt is here made to construe the provisions of the mortgage to the effect that the mortgagor shall carry described coverage and that such insurance shall be carried in companies approved by the mortgagee. Neither is the attempt made here to justify or harmonize the reasons set forth in the letter by the mortgagee to the mortgagor in the light of the obvious intent of the mortgage provision relating to this subject.

There is a field here which is subject to reasonable regulation by the legislature. This question of controlled insurance has been

made the subject of legislation elsewhere; however, to this date our legislature has taken no action with respect thereto.

The Insurance Commissioner has no control over the terms of the mortgage in question, the construction to be placed upon any part thereof, or the rights as between the mortgagor and the mortgagee in relation to the placing of this insurance. Since such matters do not fall within the supervisory powers of the Insurance Commissioner, it is sufficient here to state that the Insurance Commissioner has no duties or responsibilities to perform under our laws in relation thereto.

October 27, 1953.—053-291.

INSURANCE COMMISSIONER'S DUTY—CARE CONTRACTS

QUESTION: In view of the provisions of Ch. 28190, Laws of Florida, Acts of 1953, Ch. 651, F.S., 1953; what duty rests upon the Insurance Commissioner with respect to persons, firms or corporations which, in pursuance of contracts entered into prior to the effective date of said act, on said date were engaged in the business of furnishing care to individuals, as contemplated by said Ch. 28190?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 28190 comprehensively regulates agreements between persons (including firms and corporations) and individuals for maintenance or personal care by the former of the latter for a period of years or life, as defined and set forth in said act. Features of the act here relevant are mentioned.

A person engaging in such business must obtain a certificate of authority, renewable annually, from the Insurance Commissioner (§4). Application for certificate must be accompanied by a deposit with the Insurance Commissioner of described securities in the aggregate market value of \$75,000, and such deposit must thereafter be maintained with said officer (§§5 and 9). The application and/or annual statement must evidence, among other things: type of agreement to be used; itemization of outstanding contracts, consideration with respect to each agreement and conditions thereof; location and description of physical property or properties essential and sufficient for the requirements of such contracts; sufficiency of funds available to perform contract obligations for the calendar year, the "unearned reserve" as required by the act, and investments in pursuance of the act (§5). It is remarked that the "unearned reserve" as to each agreement is that portion of the consideration which has not been earned, computed according to the actuarial factors prescribed (§6). When the Insurance Commissioner determines that a person engaging in such business has failed to comply with the act, in specified particulars, he is required to institute liquidation proceedings against such person (§11). A person engaging in such business without complying with the act is subject to prosecution (§13).

Section 4 of the act contemplates that the provisions of Ch. 28190 are applicable not only to those entering into such business

after the effective date of the act, but also those engaged in said business at and prior to such effective date. Section 14 provides that the act "shall become effective on July 1, 1953, but institutions governed by this act shall be allowed until September 1, 1953, to complete filings with the Commissioner required hereunder." Section 12 sets forth a severability clause and provides "It is further specified as legislative intent that if a court should hold that the provisions of this act are invalid in relation to such care contracts as may have been entered into prior to the effective date of this Act, such adjudication shall not render the Act void, but that the provisions of the Act shall be construed as applicable to such care contracts entered into on and after the effective date of the Act."

The question derives from conferences had between officials of the corporations now in control, respectively, of the Ormond Beach Hotel and The Casements, at Ormond Beach, Florida. The former of these corporations came into possession of such property as result of litigation involving care contracts theretofore entered into between individuals residing in said property and another corporation, which litigation, we are informed, is now on appeal in our Supreme Court. Like litigation between residents of The Casements and such former corporation, involving care contracts, resulted in that property being taken over by a corporation formed by such resident holders of contracts, The Casements, Inc. We may avoid discussing the property and rights still in litigation; the present situation confronting The Casements, Inc., will be the basis of this discussion leading to the conclusions below, and will meet the requirements of the question.

The Casements, Inc., has entered into no care contracts since the effective date of Ch. 28190. It is concerned with contracts for care entered into between such residents and the predecessor corporation. It is impossible for it to comply with Ch. 28190 for several reasons, certain of which are mentioned: It has not available sufficient funds for the required deposit of \$75,000 in securities; the considerations for existing contracts and money now available with respect thereto were and are insufficient to maintain the unearned reserve required by the act; and it is extremely doubtful if the corporation could evidence such possession and/or ownership of physical properties and money for the calendar year's requirements, as contemplated by the act. Yet there exist such contracts and such legal relationships and rights between such residents and their corporation.

It is readily apparent that if The Casements, Inc., is determined to be subject to the provisions of Ch. 28190, then in pursuance of Sec. 11 thereof, the duty devolves upon the Insurance Commissioner to require compliance or to seek an order of the Court liquidating it. It would be an easy dismissal of the question to require compliance according to the express wording of the act. But we are here dealing not with theories so much as the cold practicalities of individuals who sought the security of care by entering into contracts therefor and, who now, in relation to their corporation are "caught short". It is the fixed policy of this office not to pass upon the constitutionality of statutes. That policy does not preclude

the construction of this statute in relation to this situation confronting The Casements, Inc., and these people.

Chapter 28190 is an exercise of the state's police power. Valid exercise of the police power interferes with rights otherwise constitutional, including the prohibition in Art. 1, Sec. 10, cl. 1, U. S. Const., against impairment of contracts by state law (E.g., *Home Building & Loan Ass'n. vs. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413; *State of Indiana ex rel Anderson vs. Brand*, 303 U. S. 95, 82 L. Ed. 586; *Eagle Ins. Co. vs. Ohio*, 153 U. S. 453, 38 L. Ed. 778); and the like prohibition in §17, Declaration of Rights, Fla. Const. (E.g., *Southern Utilities Co. v. City of Palatka, Fla.*, 99 So. 236, 268 U. S. 232, 69 L. Ed. 930; and see *State ex rel Municipal Bond & Inv. Co. vs. Knott, Fla.*, 154 So. 153; *Hillsborough County vs. Bregenzer, Fla.*, 10 So. 2d. 498).

On the other hand, although the obligations of contracts must yield to the proper exercise of the police power, the power must be exercised for an end which is in fact public, and the means adopted must be suitable to accomplishment of that end and must not be arbitrary or oppressive. E. G., *Treigle vs. Acme Homestead Association*, 297 U. S. 189, 80 L. Ed. 575. It is hardly conceivable that as to The Casements, Inc., successor to the original corporate contractor, and those whose contracts it recognizes, the public interest would be served by the Insurance Commissioner invoking the liquidation proceedings mentioned with possible "arbitrary and oppressive" results with respect to such contracts and rights thereunder. As between The Casements, Inc. and such resident contract holders, what rights may exist we do not attempt to say; but reasonably it appears that under the circumstances here found such corporation is not to be adjudged as subject to this law. The corporation and such individuals should be left undisturbed to settle possible contract rights in such manner as may be agreed to or as the courts may decide.

As to persons, firms or corporations engaged in such business of furnishing care under agreements at and prior to the effective date of Ch. 28190, it is my construction of §14 thereof, deriving from practical considerations, that the effective date of such act is September 1, 1953.

In view of the foregoing, in my opinion the question is answered as follows:

The Insurance Commissioner should investigate each person, firm and corporation who, at and prior to September 1, 1953, was engaged in the business of furnishing maintenance or personal care to individuals for a period of one or more years or for life, in pursuance of agreements and considerations therein named, as contemplated by Ch. 28190, Laws of 1953. Whether such person, firm or corporation is subject to the provisions of said act must depend upon existing circumstances as disclosed by the Commissioner's investigation, as follows:

(1) Where such person, firm or corporation has entered into agreements which meet the requirements of the actuarial factors

of the act, is able to make such deposits, and otherwise meet the requirements, financial and otherwise, of the act, such person, firm or corporation is subject to the provisions of the act.

(2) Where such person, firm or corporation cannot meet the requirements of the act in any of the particulars set forth in the preceding paragraph, and ceased to enter into agreements for the furnishing of such care prior to September 1, 1953, to the extent that agreements theretofore entered into, or rights under such agreements, would be impaired were the act applied, the act is not applicable.

(3) Where any such person, firm or corporation, as described in the immediately preceding paragraph, has entered into any such agreements on and subsequent to September 1, 1953, such person, firm or corporation is subject to the provisions of said act.

July 9, 1954.—054-161.

INSURANCE—FOREIGN INSURERS, LIABILITY—PREMIUM
RECEIPTS TAXES—COMPUTATION—

§205.43, F.S.

QUESTION: Where a foreign insurance company is authorized to issue life and health and accident policies, but has made application for and received certificate of authority in this state only to engage in the life insurance business, is it required as a condition precedent to issuance of renewal of its certificate of authority to pay to the State Treasurer the 2% premium receipts tax prescribed by §205.43, F.S., computed not only on life insurance premiums paid by policyholders in this state, but also on premiums on health and accident policies paid in this state by insureds who became residents of Florida subsequent to issuance to them of such health and accident policies in other states?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The letter of the Vice President and General Counsel of the involved mutual insurance company recognizes the right of Florida to exact said premium receipts taxes computed on the business it is authorized to engage in here, viz., the life insurance business, but asserts that the requirement of the state that there be included in such computation premiums paid in this state by residents who prior to their removal here obtained such insurer's health and accident coverage, constitutes an infringement of rights of the insurer under the federal commerce clause. In such officer's very respectable presentation of this issue, no cases from other states directly in point are cited; rather, the legal authorities cited (51 Am. Jur. 748, 753; 105 A.L.R. 39) deal generally with forms of taxation constituting burdens in relation to the commerce clause.

The two per cent tax imposed by §205.43 (2) F.S., is a privilege or license tax which must be paid as a prerequisite to a foreign insurance company engaging in business in this state. *Peninsular Casualty Co. vs. State, Fla.*, 67 So. 165. It is to be observed that said mentioned law does not purport to impose a direct tax upon premiums, but that such tax is described "As an amount equal to

two per cent of the gross amount of receipts of insurance premiums . . . paid by policyholders . . . in this state," with certain credits provided. It is to be noted that no specific provision of §205.43(2), as to any authorized foreign insurer, limits the computation of the tax to only those premiums collected during the preceding calendar year on such an insurer's contracts of the nature authorized in its certificate of authority; further, in its computation, the tax is not limited to premiums paid on contracts originally issued to residents of this state.

It is elementary that tax statutes, if ambiguous, are strictly construed in favor of the taxpayer and against the taxing power. E.g., *A.C.L. R. Co. vs. Amos, Fla.*, 115 So. 315. In relation to this question we do not consider there is any ambiguity.

The disturbing effect of the case of *United States vs. South-Eastern Underwriters Association, et al.*, 322 U. S. 533, 88 L. Ed. 1440, was followed by the passage by Congress of Public Law 15 of March 9, 1945 (U.S.C.A. Title 15, Sections 1011-1015). For instant purposes, the effect of that law is expressed in subsection (a) of said Section 1012: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Such doubts as may have existed with respect to validity of this legislation were removed by the case of *Prudential Ins. Co. vs. Benjamin*, 328 U. S. 408, 90 L. Ed. 1342. The effect of that case was to recognize the right of the state to regulate and tax foreign insurers to the same degree as existed prior to the *South-Eastern Underwriters case*.

No time is here consumed citing authorities to support the general assertion that a state may impose the conditions to be met by a foreign corporation prerequisite to its being permitted to engage in business in such state.

Florida has the gross premium receipts tax mentioned. Certain of the states impose a tax on insurance companies based upon a percentage of gross receipts for the privilege of doing business in such states. *Appleman, Insurance Law and Practice, Vol. 19 p. 293, §10588*. Statutes imposing such a tax have been held constitutional; *Northwestern Mutual Life Insurance Co. vs. State, Wis.*, 207 N.W. 430, 434, reversed on other grounds, 275 U. S. 136, 72 L. Ed. 202, and vacated on other grounds, 218 N.W. 98. See also *Pittsburgh Life & Trust Co. vs. Young, N. C.*, 90 S.E. 568; *New York Life Ins. Co. vs. Wright, Ga.*, 122 S.E. 706; *Northwestern Mutual Life Ins. Co. vs. State, Wis.*, 155 N.W. 609, affirmed, 247 U. S. 132, 62 L. Ed. 1025. Now reasonably it would seem to follow that if a gross receipts tax law is valid, there is nothing unconstitutional in the requirement that the insurer here in computing the premium receipts tax required by said §205.43 shall include in such computation premiums paid in this state on its health and accident policies under the circumstances here found.

In view of the foregoing, in my opinion the question is answered as follows:

The question is answered in the affirmative; that is to say,

that this foreign insurer as a condition precedent to continuing to engage in business in this state (renewal of its certificate of authority) is required by the provisions of §205.43, F.S., to include in its computation of premium receipts taxes, required by said section; not only premiums paid in this state on its life contracts, but also the amount of premiums paid to it in this state by holders of its health and accident policies originally issued to such policyholders in other states.

July 14, 1954.—054-169.

INSURANCE—CREDIT PROTECTION POLICY—CUSTOMER'S
CONTRACT—CANCELLATION OF BALANCE
DUE UPON DEATH

QUESTION: Does the proposed agreement, described below, constitute a policy of insurance under the laws of this state?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

A business concern engaged in the sale of merchandise to customers on instalment payment contracts proposed to issue such a customer a "credit protection policy", which recites that the person named therein has become indebted to the business concern under such a contract and by reason thereof has become entitled to said "credit protection policy" affording the following benefits, subject to stated terms and conditions in the instrument: (1) Upon death of such customer, cancellation of the balance due on the customer's account. (2) In event of illness resulting in total physical disability of the customer, the suspending of payments required by the purchase contract, the amount thereof not to exceed in the aggregate two months' payments. (3) In the event of accident resulting in total physical disability of the customer, the suspending of such payments not to exceed in amount the aggregate of two months' payments. (4) In event such customer is unable to make payments by reason of involuntary unemployment, suspension of such payments not to exceed in amount the aggregate of two months' payments.

The statement is made by the attorney for this business concern that it is planned to give this policy "gratuitously to the customers of (the business concern) on all time purchases without any increase whatsoever in connection with the time purchases."

Reasonably it would appear that under the mentioned circumstances the agreed consideration for the merchandise would include consideration for the proposed "credit protection policy".

We construe the provisions of the proposed policy pertaining to the suspending of instalment payments under the circumstances recited not to mean a cancellation of such payments, but a deferring of the time of payment thereof. If this construction is correct, then it would appear that the policy provides for cancellation of instalment payments required by such a contract only in the event of death.

The term "insurance" may be said to be an agreement whereby, for a premium or other consideration, one party undertakes to

compensate another for loss on a specific subject when caused by specific perils or the happening of a described contingency. *State vs. DeWitt C. Jones Co., Fla.*, 147 So. 230, 232; 21 Words and Phrases, "Insurance"; 44 C.J.S. 471, Section 1; *Black's Law Dictionary*, 3rd Ed., 989.

The provisions of said "credit protection policy", to suspend payments under the contingencies mentioned and in the light of our construction of such provisions do not constitute insurance in relation to such suspended payments.

In my opinion the "credit protection policy", to the extent that it provides for cancellation of balance due on a customer's contract in the event of his death under the terms and circumstances set forth, constitutes a policy of insurance within the contemplation of the laws of the State of Florida. Hence, the question is answered in the affirmative.

REGULATION OF RATES FOR CASUALTY INSURANCE AND FIDELITY, GUARANTY AND SURETY BONDS

March 9, 1953.—053-56.

INSURANCE RATES—ASSIGNMENT OF DIVIDENDS— VIOLATION OF CH. 630 F.S.

QUESTION: Under the provisions of Ch. 630, F.S., lawfully may a foreign mutual insurance company issue through its Florida agent a policy covering physical damage to an automobile in pursuance of the application of the insured, in which application the latter assigns to the company any savings or dividends which may be payable to the insured by the insurer under the terms of the policy?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The file which accompanied the request for opinion approaches the matter from the standpoint that there is no specific law in the domiciliary state of the company or in Florida dealing with an insured assigning dividends, as here sought; and the request is made that the Insurance Commissioner notify the company that such official's approval of said assignment is not necessary, and that there is no objection to its use. We believe the real question here is as above stated.

The disturbing effect of *United States vs. South Eastern Underwriters Association, et al.*, 322 U. S. 533, 88 L. Ed. 1440, resulted in passage by Congress of Public Law 15 of March 9, 1945 (U.S.C.A., Title 15, Sections 1011-1015). That legislation assured to the states their continued right to regulate and tax foreign insurers under the conditions stated, and was upheld in *Prudential vs. Benjamin*, 328 U. S. 408, 90 L. Ed. 1342. Prior to June 30, 1948, as stated in said federal law, Florida adopted regulatory measures considered necessary to comply with such federal legislation, among which was Ch. 22637, Laws of 1945, which session law, as amended, appears as Ch. 630, F.S. 1951. That chapter pertains to the regula-

tion of rates for casualty insurance and fidelity, guarantee and surety bonds; and it is applicable to the rate permitted to be used in the policy contemplated by the above question.

Rates for casualty insurance contracts issued in this state are required to be made and approved in accordance with the provisions of said chapter, as prerequisite to their use in Florida (generally, see Ch. 630; specifically, §630.03(8)). It is sufficient here to state that filings in connection with such rates shall be made by each insurer (§630.03(1)), or such requirement may be met by an insurer becoming a member of or subscriber to a licensed rating organization, as contemplated by Ch. 630, specifically §630.04 (§630.03(2)). If the insurer is a member or subscriber of such a rating organization, provision is made for deviations, if desired, to be approved by the Insurance Commissioner, (§630.05); and the statute so authorizing deviations obviously was enacted to insure free competition in the industry. *Northwestern National Insurance Company vs. Mortensen (Wis.)*, 284 N.W. 13.

It is to be observed that whether this particular mutual company operates in Florida under approved rates in pursuance of its own filings, or as a member or subscriber of a rating organization, it may not issue contracts in this state except in pursuance of approved filings. If it is a member or subscriber of a rating organization and desires to issue contracts at rates less or more than those provided by the organization and approved by the Commissioner, such may be accomplished by having the Commissioner approve deviations in pursuance of §630.05, F.S.

The regulation of rates is in the public interest; and as far as the public is concerned such rates become actualities only in relation to the insurance contracts in which they are used. The effect of an applicant for coverage with this company assigning to the company possible dividends which may be payable under the type of contract contemplated by the question, directly impinges upon the subject of rates. Since there is here contemplated the payment of dividends in connection with this policy, we assume without question that it is a participating policy, and that the approved rate under which it is written in this state is in relation to it as a participating policy. There is a vast misconception in relation to the meaning of "dividends" in connection with amounts paid back to holders of mutual policies. These so-called "dividends" are not dividends at all in the accepted and ordinary sense of the word; the purchase of a mutual policy which may result in "dividends" being paid to the policyholder in pursuance of policy provisions constitutes no investment in the ordinary sense of the word. These "dividends" represent an excess premium or over-charge paid by the policyholder and then returned to him; in other words, the policyholder creates a surplus by paying more for his insurance in advance than it should actually cost and the amount returned to him is his proportionate part of the excess so paid. *Rhine vs. New York Life Insurance Co.* 248 App. Div. 120, 29 N.Y.S. 117, affirmed 273 N.Y. 1, 6 N.E. 2d 74, 108 A.L.R. 1197. Generally concerning this same subject matter, see also *Garafano Const. Co. vs. Lumber Mutual Casualty Ins. Co. of N.Y.*, 26 N.Y.S. 2d, 780; *Appleman, Insurance Law and Practice*, Vol. 18, page 149, Section 10060.

Among the authorities of this and other states, the nearest approach thus far found by us to this situation is in *Department of Insurance, etc., vs. Merchants Fire Insurance Co., etc., (Ind.)* 57 N.E. 2d 62. In that case it was held that a participating term policy issued by a fire insurance company providing for payment of premiums in equal annual installments, with provision for payment of participating dividends only to a policyholder who renews his policy by payment of the next annual installment, was not invalid as constituting an unlawful deviation from schedules, rules and regulations of a rating bureau. An examination of this case will show that the applicable Indiana law in 1937 was different to the provisions of Ch. 630 in relation to this question. As pointed out, an insurance contract of the nature here found may be written only in pursuance of the rate approved by the Insurance Commissioner. It is quite apparent that to require an applicant for such a policy to assign to the company possible "dividends" payable in pursuance of a contract to which the approved rate is applicable, constitutes possible payment by the insured of a rate in excess of that approved for the policy.

Hence the above question is answered in the negative; that is to say, that the proposed assignment of dividends by an applicant for insurance of the nature described in the question, and issuance of policy in pursuance of such application, would constitute the issuance of a policy by this insurer in violation of the provisions of Ch. 630, F.S.

FIRE AND CASUALTY INSURANCE

May 25, 1954.—054-125.

INSURANCE—RELEASE OF DEPOSIT

QUESTION: Under the circumstances set forth below, is the Insurance Commissioner authorized to deliver to a domestic mutual fire insurance association organized under Ch. 632, F.S., deposit of \$20,000 par value U. S. Treasury Bonds made by said association with the Insurance Commissioner and held by such official in pursuance of the provisions of §631.06-631.10, F.S.?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Such association is referred to herein as "company". §631.06, F.S. requires, among other things, each fire insurance company to deposit with the Insurance Commissioner described bonds or cash to the amount of \$20,000, or a surety bond, as described. Such deposit is for the protection of policyholders of such insurer; and in this connection see the provisions of §§631.08 and 631.09, F.S.

Section 631.10, F.S., provides that if any fire insurer "shall cease to carry on business in this state, and its liabilities, whether fixed or contingent, upon its policies to persons residing in this state, shall have been satisfied or shall have terminated, upon satisfactory evidence of the fact to the insurance commissioner, he shall deliver to such insurer the bonds in his possession belonging to it...; or if such insurer shall reduce the amount of its

liabilities, both fixed and contingent, upon its policies to persons residing in this state below the value of" such bonds, the insurance commissioner may deliver to such insurer the part of such bonds exceeding in value such liabilities.

It appears that associations incorporating under Ch. 632, F.S., do so by the required number of persons filing with and obtaining approval of the Insurance Commissioner of their charter, as contemplated by §§632.01-632.06. In addition to covering risks of loss by fire, such an association may insure with respect to the other risks detailed in §632.08. While the \$20,000 in securities was required of this company in connection with its authority to issue fire insurance policies, once deposited it became equally subject to policies of the company covering other risks mentioned. *Union Indemnity Co. vs. Knott, Fla., 143 So. 221; Bohlinger vs. Higginbotham, Fla., 70 So. 2d 911.*

Copy of "Certificate of Dissolution" which accompanied the request for opinion recites, among other things: On September 1, 1953, the Board of Directors of the company adopted a resolution that the company be dissolved, its obligations paid and net assets distributed to the members in accordance with their ownership of the policyholders' reserve as shown by the books and records of the company. That on September 12, 1953, at a meeting of all members of the company, resolution was adopted confirming the resolution of the Board of Directors, that the corporation be dissolved immediately, that it surrender its charter and perform no further functions, and that a proper certificate be executed by the proper officers of the corporation accomplishing such action. That on September 17, 1953, the President and Secretary of the company executed said certificate for filing with the Insurance Commissioner and requesting such official to issue his certificate that same had been filed and the corporation dissolved. No necessity exists here to deal with the question of the regularity of the procedure adopted by the company to accomplish its dissolution.

The company now requests the Insurance Commissioner to return to it such deposit.

The demand for return of such deposit presents difficulties which are not novel to this office. Attention is directed to the words "upon satisfactory evidence of the fact to the insurance commissioner" as the same appear in said §631.10. We have here no procedure such as is prescribed in connection with release of deposit of a limited surety company in §649.06(2), F.S. We have no court decision construing the import of such quoted words. Reasonably it would appear that should the Insurance Commissioner ascertain from an examination of this company that there exists no outstanding policy liability, fixed or contingent, such would constitute the "satisfactory evidence" contemplated by said §631.10 to warrant the release of the deposit by the Commissioner. Nevertheless, in the absence of such procedure or court construction, we must assume the rather harsh position that if the Commissioner should release this deposit and thereafter should a valid policyholder's claim be asserted, the official bond of the State Treasurer might be liable. Yet, in view of the circumstances here found, it is

felt that the matter can be coped with notwithstanding this last position mentioned.

We arrive at certain conclusions from statements appearing in the copy of letter of November 6, 1953, from Frank deVeer, Chief Auditor of the Insurance Department, to the Commissioner; (1) The last annual statement filed by this company was for the calendar year ending December 31, 1949. (2) The last \$200 annual license tax paid by this company was in November 1949. (3) The activities of the company in recent years appear to have been confined principally to renewing or keeping in force insurance carried by a limited group of policyholders with closely affiliated interests in citrus fruit groves in the general area of Pasco County. (4) We conclude from these statements that this company has written no new business since the close of the calendar year of 1949.

Thus, it is apparent that this company has been in process of liquidation since 1949; and that its business has been limited in scope to a particular group. Hence, it is respectfully suggested that reasonably it appears that the Insurance Commissioner can ascertain with finality the status of this company in relation to the question of the existence or nonexistence of liability, whether fixed or contingent, of this company on any of its contracts. It would seem that "satisfactory evidence", as such words are used in §631.10, can be adduced by or for the Commissioner by an examination of the affairs of the company, the requirement of sworn statements of its officers, and the prosecution of such further inquiry as may appear necessary, after such examination, in relation to contracts heretofore issued, to settle the question.

June 18, 1954.—054-150.

INSURANCE—FIRES—LOSS PAYABLE UNDER BLANKET COVERAGE

QUESTION: A policy is issued insuring against the risks of loss by fire and lightning with endorsement providing blanket coverage, on a 90% co-insurance basis, of two buildings valued, respectively, at \$10,000 and \$15,000, total coverage \$22,500. In event of total loss by fire of the building valued in said policy at \$10,000, what would be the insurer's liability under the policy?

To: Honorable J. Edwin Larson, Insurance Commissioner:

This question has arisen by reason of the contention in certain quarters that in event of loss by fire of the \$10,000 building, if the actual value thereof was \$15,000, such would be the loss payable.

The policy was written at an average rate. A description of the insured buildings and their values appear in the endorsement under the "Valuation Clause", which is quoted: "To comply with the laws of the State of Florida the insurable value of all buildings covered hereunder and their locations are as follows..."

From the "Memorandum of Insurance" which accompanied the request it is not apparent that the policy issued contains an "average clause" or a "pro rata distribution clause," and it is as-

sumed that the policy contains neither of such clauses; and in this opinion it is further assumed that the provisions appearing in said memorandum are identical with the provisions appearing in the issued policy.

Certain clauses which appear in said policy are quoted:

"It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the insured shall at all times *maintain insurance on each item of property insured by this policy of not less than ninety per cent of the actual cash value thereof*, and that, failing to do so, the insured shall be an insurer to the extent of such deficit, and in that event shall bear his, her or their proportion of any loss."

"In the event that an aggregate claim for any loss is less than Ten Thousand Dollars (\$10,000) (provided, however, such amount does not exceed five per cent (5%) of the total amount of insurance upon the property described herein and in force at the time such loss occurs) no special inventory or appraisalment of the undamaged property shall be required. *If this policy be divided into two or more items, the foregoing condition shall apply to each item separately.*"

"In case of partial loss, the actual cash value of the property so insured at the time of the loss shall be the basis for determining the proper amount of such co-insurance and the amount of the loss regardless of the insurable value stated in the policy of any building insured hereunder and notwithstanding any previous valuation of such building.

"The insured shall see that the amount of insurance carried is equal to the stipulated percentage of actual cash value to avoid the insured being a contributor under this policy in the event of partial loss." (Emphasis supplied).

The nature of blanket insurance as characterized by reputable authorities and courts of other jurisdictions is mentioned.

Where a blanket policy does not contain an average or pro rata distribution clause, the insurer is liable for the full amount lost, up to the amount of the policy, and not a sum proportioned to that insured as compared to the whole amount at risk. It is the essence of blanket insurance that it attaches to and covers to its full amount every item of property described in it, in the absence of provision for distribution between the items covered. Generally on the subject, see 29 *Am. Jur.* 888, 889, *Sec. 1180*; *Appleman, Insurance Law and Practice*, Vol. 6, pages 217-225, *Sec. 3866*; *Wilson & Co. vs. Hartford Fire Ins. Co.*, Mo., 254 S.W. 266; *Kinzer vs. National Mutual Ins. Asso.*, Kan., 127 P. 762; *Aldrich vs. Great American Ins. Co.*, N. Y., 186 N. Y. S. 569, 195 App. Div. 174; *Republican Ins. Co. vs. American Ice Co.*, Tex., 2 S.W. 2d. 329.

§631.04, F.S., requires any insurer insuring any building against loss or damage by fire or lightning, to cause said building

to be examined by an agent or representative and that a full description be made and the insurable value thereof fixed by such agent or other representative and written in the policy. The section further provides: "In the absence of any change increasing the risk without the consent of the insurers, in case of total loss the whole amount mentioned in the policy upon which the insurers receive a premium shall be paid, (except in case of losses under policies carrying a co-insurance clause as authorized by §631.12), and in case of partial loss the full amount of the partial loss shall be paid, but in no case shall the insurer be required to pay more than the amount upon which a premium is paid. The insurer shall be estopped from denying that the property insured was worth, at the time of insuring, the amount of the insurable value as fixed by the agent or other representative."

A part of §631.05, F.S., provides: "In case of the total loss of the property insured the measure of damage shall be the amount upon which the insured paid a premium, and, in the case of partial loss, the measure of damage shall be such part of the amount upon which premiums are paid as the damage sustained is part of the insurable value of the building or other structure as fixed by the agent of the insurer." The remainder of §631.05 was added by Ch. 25092, Laws of 1949, and is not here relevant.

It is pointed out that §631.04, F.S., except the part in parentheses referring to §631.12, and the quoted part of §631.05, derived from original Ch. 4677, Laws of 1899. There appear to be no inconsistent provisions as between the two sections; we construe the quoted part of the latter section as setting forth the measure of damages for total and partial losses and as implementing the references to total and partial losses in §631.04. We do not construe the reference to co-insurance contracts in §631.04 as relieving such a contract of the valued policy provisions of said section.

Generally, with respect to the valuation fixed in a policy in pursuance of the valued policy statute, our Court has said: "The valuation clause constituted one of the conditions upon which the insurance was effected and constituted a warranty 'by the assured' and was 'accepted as part of this contract,' presumably by the insurer."

With the provisions of these three statutes in mind, attention is again directed to the policy provisions quoted above. At this point it is to be observed that we are here dealing with blanket coverage of two items consisting of buildings required by law to be valued in the policy; and the further remarks herein are confined to such specific situation.

A reading of said policy provisions evidences that a respectable argument can be made that in relation to the co-insurance clause, each of said two items stands on its own basis; that although there is no specific average of pro rata clause, the effect of the wording of such provisions is to attain the same results as though the policy contained such a clause. If such construction is applied, then in the event of total loss by fire of the \$10,000, the insurer would be required to pay \$9,000. On this point, see Richards on Insurance,

5th Ed., Vol. 3, page 1816, §544, particularly footnote 9, page 1817. In several instances, our Court has found that where a policy covered separate buildings or items, in event of loss of one item, for stated purposes the contract was to be considered divisible as to the several items, where such was not contrary to policy provisions, e.g., *National Union Fire Insurance Co. v. Cubberly, Fla., 67 So. 133*. However, it is quite doubtful that the cited case and other similar cases are of benefit here in view of the circumstances and contracts therein found.

On the other hand, the instant contract and policy provisions are reasonably susceptible of the construction that loss of the \$10,000 building would constitute a partial loss under the policy. At this point attention is taken of reference in said quoted policy provisions to "actual cash value at the time of loss." The value of the \$10,000 building under the requirements of said §631.04 is \$10,000 for all the purposes of this contract, regardless of the cash value reference noted. Furthermore, the policy evidences on its face that the 90% co-insurance clause has been fully complied with. Hence, under this construction, in the event of the total loss by fire of such building, the insurer would be required to pay \$10,000.

It is submitted that there is ambiguity in this contract. It is too elementary to require citation of authorities to support the statement that where policy provisions are susceptible of two constructions by reason of ambiguity, the construction most favorable to the insured shall be adopted.

In view of the foregoing, in my opinion if the building in the policy were totally destroyed by fire, the amount payable by the insurer to the insured would be the sum of \$10,000.

It is further recognized that there are distinct controversial angles to the question; that only a court in a proper proceeding could resolve this question with finality. Hence, if it is the desire of the Insurance Commissioner, this office will undertake to obtain a court construction of this contract in relation to the question.

March 4, 1954.—054-56.

INSURANCE—RETURN OF DEPOSIT

QUESTION: Should U. S. Government bonds of the approximate par value of \$60,000 constituting the deposit, under §631.06, F.S., of Narragansett Insurance Company with the Insurance Commissioner of Florida, be returned to said company, under the facts and circumstances related below?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Heretofore, Rhode Island Insurance Company (hereinafter referred to as "Rhode Island") and Pioneer Equitable Insurance Company of Indiana (hereinafter referred to as "Pioneer") respectively made deposits with the Insurance Commissioner of \$20,000 each, in pursuance of §631.06, F.S., the character of such deposits

not being specifically described in the data accompanying the request for opinion. On March 31, 1949, Rhode Island reinsured the risks of Pioneer located in Florida, and received an assignment from the latter of said deposit which, with its own deposit, increased Rhode Island's deposit with the Commissioner to \$40,000.

On July 7, 1950, order was entered in the Superior Court of the State of Rhode Island appointing a temporary receiver for Rhode Island, which receivership was made permanent on July 20, 1950. On October 16, 1950, an agreement was entered into between the Insurance Commissioner, acting on behalf of the policyholders of Rhode Island in Florida, and Narragansett Insurance Company, of Providence, R. I. (hereinafter referred to as Narragansett), whereby the latter agreed to reinsure and assume, effective noon, October 16, 1950, "100% of the liability of RHODE ISLAND to Florida policyholders on all policies of RHODE ISLAND in force and unexpired on said date. By this agreement NARRAGANSETT agrees to assume liability for all losses under policies reinsured hereunder occurring after noon on October 16, 1950, and for all return premium under said policies resulting from cancellations effective after noon, October 16, 1950... "NARRAGANSETT further agrees to assume, effective from noon, October 16, 1950, all outstanding losses of the RHODE ISLAND due to Florida policy-holders and all outstanding losses of the PIONEER EQUITABLE INSURANCE COMPANY due to Florida policyholders on Florida business heretofore assumed by the RHODE ISLAND."

The mentioned reinsurance agreement further recited that the premium for the reinsurance assumed thereunder consisted, among other things, of the following:

"By the assignment to NARRAGANSETT of the \$40,000 in bonds or other property now on deposit with the COMMISSIONER, consisting of deposits originally made by RHODE ISLAND and PIONEER. By executing this agreement the Commissioner hereby acknowledges the assignment of said deposits to NARRAGANSETT."

On January 1, 1952, Narragansett and Continental Fire and Casualty Corporation of Dallas, Texas, (hereinafter referred to as "Continental"), entered into a treaty of reinsurance, under which Narragansett ceded to Continental and the latter "hereby reinsures and assumes as of 12:01 A.M., January 1, 1952, One Hundred Per Cent (100%) of all policy liability of whatever nature of the CEDING COMPANY under all policies and contracts of insurance and reinsurance written by the CEDING COMPANY which are in force as of January 1, 1952, and under all policies and contracts of insurance and reinsurance on which liability is assumed by the CEDING COMPANY after 12:01 A.M., January 1, 1952, and the REINSURER further agrees and as a part of said 100% assumption and reinsurance, the REINSURER will substitute itself for the Narragansett and service, adjust and settle all obligations directly with the insureds and reinsureds whose contracts are hereby reinsured and assumed." There was the further provision that:

"No liability will insure to the REINSURER for any claims against the CEDING COMPANY which occurred prior to January 1, 1952, but the REINSURER agrees to service, adjust and settle such claims for the account of CEDING COMPANY and at CEDING COMPANY'S expense."

Art. VI of this agreement provided: "It is understood that the CEDING COMPANY does not reinsure with the REINSURER under this agreement any part of the 75% Quota Share reinsurance which NARRAGANSETT INSURANCE COMPANY has assumed from THE INSURANCE COMPANY OF TEXAS under a Reinsurance Agreement entered into between them as of January 1, 1952."

On August 19, 1953, a supplement to said treaty of reinsurance was entered into between Narragansett and The Insurance Company of Texas. Certain recitals are relevant: The treaty of reinsurance between Narragansett and Continental was identified: that Continental had merged with The Insurance Company of Texas, which latter company had assumed all the former's obligations and that Continental had assigned to the other company all of its assets; that notice was taken of the above-quoted sentence in the treaty of reinsurance with respect to claims of Narragansett which occurred prior to January 1, 1952; that said treaty of reinsurance was amended and supplemented by deleting therefrom the said sentence concerning claims occurring prior to January 1, 1952, and Narragansett ceded to The Insurance Company of Texas and said latter company reinsured and assumed all liability which was excepted or omitted from said treaty of reinsurance by virtue of said sentence.

We are informed that at this date the deposit of the Insurance Company of Texas with the Insurance Commissioner, under said §631.06, consists of authorized securities of the approximate value of \$40,000 (deposits of Continental and The Insurance Company of Texas.)

The deposit of Narragansett with the Insurance Commissioner, we are informed, consists of U.S. Government securities of the par value of approximately \$60,000 (deposits of Pioneer, Rhode Island and Narragansett); and such company has demanded the return to it of said deposit.

Section 631.06, F.S., requires every fire insurance company to deposit with the Insurance Commissioner bonds of the nature therein described to the amount of \$20,000, or in lieu thereof a surety bond in such amount as described. Such securities are "for the protection of policyholders" and are applicable to claims of policyholders as provided in §§631.08 and 631.09, F.S.

Section 631.10, F.S., provides the manner and circumstances under which an insurer, which ceases to do business in this state, is entitled to have returned to it the deposit made by it in pursuance of §631.06, F.S.

In my opinion the above question properly is answered as follows:

1. The following facts are assumed: (a) That at this time Narragansett owns and has on deposit with the Insurance Commissioner, under §631.06, F.S., United States Government bonds of the approximate par value of \$60,000. (b) That there has been filed with the Insurance Commissioner duly attested copies of the Treaty of Reinsurance entered into between Narragansett and Continental and the supplement to said treaty of Reinsurance entered into between Narragansett and The Insurance Company of Texas. This opinion is conditioned upon such assumptions.

2. The Insurance Commissioner may release said securities of the approximate par value of \$60,000 to Narragansett if, as provided in the second paragraph of §631.10, F.S., that company has ceased to carry on business in this state and has evidenced to the Commissioner that it has satisfied its fixed liabilities for losses upon its policies to persons residing in this state (including possible policies of Pioneer and Rhode Island), and that it has satisfied all taxes in this state, and there is deposited with the Commissioner by The Insurance Company of Texas "bonds not less in value" than those composing the Narragansett deposit, such substituted bonds to be of the character of those described in the first paragraph of said §631.06.

3. The Insurance Commissioner may release said securities of the approximate par value of \$60,000 to Narragansett if, as provided in the first paragraph of said §631.10, that company has ceased to carry on business in this state and has evidenced to the Commissioner that "its liabilities, whether fixed or contingent, upon its policies (including possible policies of Pioneer and Rhode Island) to persons residing in this state", have been satisfied or shall have terminated. This requirement of Narragansett concerning satisfaction of fixed or contingent liabilities upon such policies would be met upon The Insurance Company of Texas evidencing to the Insurance Commissioner that the respective insureds in said policies had agreed to the assumption thereof by The Insurance Company of Texas.

4. Attention is also directed to the following part of the first paragraph of said §631.10: "...if such insurer shall reduce the amount of its liabilities, both fixed and contingent, upon its policies to persons residing in this state below the value of the bonds in possession of the said commissioner, he may deliver to such insurer a part of such bonds, taking care, however, that the bonds in his possession shall always be equal in value to the liabilities of said insurer upon its policies to persons residing in this state."

AGENTS

October 16, 1953.—053-274.

INSURANCE—PARTNERSHIP AGENCY— DIVISION OF COMMISSIONS

QUESTION: Where members of a partnership operate an insurance agency and share in commissions on business written,

are all such members required to be licensed as agents under Ch. 28075, Laws of 1953?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Opinions of my immediate predecessor in office, numbered 045-319 and 045-323 (1945-46 Biennial Report, 678, 679), dealt with the propriety of payment by a corporate insurance agency of dividends, originally deriving from commissions on insurance written by members of such agency who were licensed agents, to a stockholder of the corporation who was not such a licensed agent. The conclusions reached in said opinions were, in effect, that such would violate the provisions of former §627.19, F.S., relating to the unlawful division of insurance commissions. Former §627.20, F.S., was also relevant to such question. Under the laws then existing, the same conclusion would have been applicable with respect to division of commissions with members of partnership agencies who were not licensed agents.

Sections 627.19 and 627.20 were repealed by §.30 of Ch. 28075, Laws of 1953. That chapter deals comprehensively with the regulation and licensing of agents (and their solicitors) representing insurers issuing the following lines of coverage: physical damage, fire and allied lines, aviation, marine, casualty, workmen's compensation, inland marine, or surety including fidelity, guaranty or surety bonds, public liability and property damage insurance.

Sections .09 and .11 of Ch. 28075 prescribe, in effect, that only natural persons may be licensed as agents; that a "firm, partnership, association, or corporation, as such, shall not be licensed."

Section .19 of said chapter provides: "If a partnership or corporation holds an agency contract, the members of the partnership and all officers and stockholders of the corporation who solicit, negotiate or effect contracts of insurance shall be required to qualify individually as agents, and all of such agents shall be individually licensed by each fire and casualty company entering into a contract with such agency."

Section .22 of said chapter deals with division of commissions. Subsection 2(a) of said section provides, in effect, that no licensee under the chapter shall divide with others or share in any commissions payable on account of insurance subject to said chapter, except that, among other things, "A resident agent may divide or share in commissions with his own employed solicitors, and with other resident agents licensed to write the same kind or kinds of insurance." Subsection (3) of said section provides that, "No such licensee shall share a commission with any corporation unless such corporation is an insurance agency." No mention is made in the section concerning a partnership agency in relation to this question.

But for the provisions of §.19 of the chapter, a reading of its entire provisions, particularly subsection .22(2)(a) thereof, above quoted, would seem to require an affirmative answer to the question. However, the provisions of said §.19 clearly contemplate the regularity of partnership and corporate agencies, the single prohibition implicit therein being that only the members of such

partnerships and officers and stockholders of such corporations who are duly licensed agents of a "fire and casualty company" may solicit, negotiate and effect contracts of insurance. The reasonable intent of the provisions of said §.19 is to permit members of a partnership agency who are not so licensed under Ch. 28075 to share in the division of commissions deriving from business written by the partnership members duly licensed.

Hence, the above question is answered in the negative.

August 9, 1954.—054-195.

INSURANCE—APPLICATION OF ANTICOERCION CLAUSE

QUESTIONS: (1) Under the provisions of §§627.92, and 643.04(10), F.S., and under rules of the Insurance Commissioner relating to the subject matter of said statutes and promulgated in pursuance of §627.73, F.S., as hereinafter explained, where a mortgagor, in connection with a loan obtained from a mortgagee, has insured mortgaged property under a 5-year annual renewal plan, elects not to exercise his option to renew such policy on the first anniversary date thereof, and proffers other insurance coverage in lieu thereof, does the mortgagee violate such stated provisions of laws or rules by his refusal to accept such preferred new policy solely on the ground that the original policy by its terms had not yet expired?

(2) Under such stated laws and rules, where such a mortgagor has furnished in connection with such a loan and mortgage a 5-year term policy payable in annual instalments, and the mortgagor elects not to pay the required instalment on the first anniversary date of such policy and proffers to the mortgagee a policy with another insurer, does the mortgagee violate such statutes and rules by his refusal to accept such proffered new policy solely on the ground that the original policy has not yet expired?

(3) The factual situation in relation to this question is quoted from the request for opinion: "Mortgagor 'A' owned the property approximately two years and decides to sell the property to mortgagor 'B'. Mortgagor 'B' requested the mortgagee to permit him (mortgagor 'B') to cancel the current fire and extended coverage contract on the property and replace it with one written by an agent and company of mortgagor 'B's' choice. The mortgagee refused to permit mortgagor 'B' the right to replace the current insurance contract written by the agent and company of mortgagor 'B's' choice." Does the refusal of the mortgagee under the stated circumstances constitute a violation of the above-described laws and rules?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Section 627.92, F.S., provides, in effect and in relation to the above questions, that no person shall require, "as a condition precedent, concurrent or subsequent to the sale or financing the purchase of... mortgage thereon, or as a condition precedent, concurrent, or subsequent, for the renewal or extension of any such loan or mortgage or for the performing of any other act in connection there-

with," that the person purchasing such property or for whom such purchase is to be financed "or to whom such money is to be loaned or for whom such extension, renewal or other act is to be granted, or performed, negotiate any policy of insurance or renewal thereof covering such property through a particular insurance company, agent, solicitor or broker." It is further provided: "This section shall not prevent the exercise by any person, firm or corporation of its right to designate reasonable financial requirements as to company, the terms and provisions of the policy and the adequacy of the coverage with respect to insurance on property pledged or mortgaged to such person, firm or corporation; provided, however, that nothing herein contained shall be construed as to prohibit the right of any person, firm or corporation from voluntarily negotiating or soliciting the placing of such insurance."

The wording of §643.04(10) is identical with the above.

The language of §627.92, F.S., is clear concerning the status of the mortgagee, mortgagor and insurance to be furnished in relation to the making of the loan, and any renewal or extension thereof. The language of the section is not so clear in relation to the situation existing when a policy furnished at the time the loan is effected expires and requires the furnishing of new coverage. The words "condition precedent, concurrent or subsequent" perhaps were intended to take care of this phase, but technically they relate to "sale", "financing", "lending", "renewal", "extension", or "performing of any other act" by the mortgagee, each of which detailed acts are to be related to a fixed date, and do not contemplate a continuing status. However, there is reference to "renewal" of a policy. While the construction is controversial, we resolve the ambiguity to the effect that the status of the mortgagee and mortgagor in relation to required insurance at the expiration of an original policy is the same as existed in relation to the furnishing of the original policy at the time of the making of the loan; and such is in harmony with the rules of statutory construction that the intent of a valid statute is the law, and that no literal interpretation should be given a statute leading to results contrary to evident legislative intent. See *Broward vs. Broward, Fla.*, 117 So. 691; *State vs. Sullivan, Fla.*, 116 So. 255.

Attached hereto are rules promulgated by the Insurance Commissioner under authority of §627.73, F.S., in relation to application of the provisions of said §627.92. Particularly it is to be noted that "renewal" of a policy in these regulations is so defined as not to include the annual renewal of a 5-year annual renewal policy.

A 5-year annual policy is described: The insured pays the first year's premium at the full rate. Under the policy terms, it is renewable for each of four successive years by the insured paying on the anniversary date of the policy 80% of the annual rate.

A 5-year term policy payable in annual instalments is described: The policy is written for a five-year term. The insured pays the first year's premium at the full rate, and engages to pay on each anniversary date during the remainder of the term 80%

of the annual rate. Failure to pay an instalment terminates the policy.

Technically, each year there is a renewal of a 5-year annual renewal policy; however, there is no occasion for "renewal" of a 5-year instalment term policy until expiration of the term. Nevertheless, as far as the insured is concerned, the operation of the two plans is identical. The insured obtains five years' coverage at the same reduced rate; and he maintains the coverage for the full 5-year period by annual payment of the required premium. The Insurance Commissioner of Florida requires the same unearned premium reserve for the two plans. Furthermore, the reduced premium rate for each of the plans is justified under Ch. 629, F.S. by savings to the insured in handling, as against issuance of yearly policies for the same period; and experience to justify such reduced rate reasonably requires the demonstrated fulfilment of such agreements, save in those instances where circumstances normally demand the dropping or cancellation of coverage. In the light of the intent of §627.92, when a mortgagor furnishes insurance under a 5-year annual renewal policy, the mortgagee may assume that such delivery implies the promise to maintain the coverage during the period named.

At this point, it is relevant to observe that should the annual renewal of a 5-year annual renewal policy be construed as a "renewal" under §627.92, lenders of money under the circumstances here contemplated reasonably could be driven to refuse to accept such type of policy and insist on a term policy paid in full or under the instalment plan. It is not considered to have been the legislative intent that the 5-year annual renewal policy and insurers issuing same should be placed at a possible competitive disadvantage by any such construction of §627.92.

The third question presents its difficulties. If the factual situation is to be construed as a release and satisfaction by mortgagee of mortgagor "A's" indebtedness, then apparently there is involved a new transaction as between the mortgagee and mortgagor "B;" and in such event most likely the anticoercion features of said statutes would be applicable in relation to existing and unexpired insurance furnished by mortgagor "A". However, we would not attempt to answer this question in absence of an actual case, with full disclosure of mortgage terms, nature of assumption of debt by a new owner, and form of mortgagee loss payable clause. For example, generally there are two types of mortgagee clauses in insurance policies, the open loss payable clause, and the union, standard or New York form of clause. In the open type, the mortgagee is only an appointee to receive funds in event of loss; there is no assignment of contract; and the rights of such an appointee are no greater than those of the insured. On the other hand, under the standard mortgage clause, the agreement of the insurer with the mortgagee is distinct from the agreement with the insured (mortgagor), and any breach of policy terms by the mortgagor is no defense to an action by the mortgagee. An example of this standard clause is described in *Fire Association of Philadelphia vs. Evansville Brewing Association, Fla.*, 75 So. 196. Among other provisions in the clause partially quoted in that case is the one

that the policy shall not be invalidated "by any change in the title or ownership of the property." The foregoing will demonstrate why we hesitate to answer this question more fully in absence of an actual case involving assumption of debt secured by mortgage with all details of agreements involved. On this matter of loss payable clauses, see *Appleman, Ins. Law and Practice*, Vol. 5, §3401 to 3407.

The above questions are answered as follows:

(1) The construction of "renewal" of policy, as contemplated by §627.92, by the Insurance Commissioner in his said rules, to the effect that such does not include annual renewals under a 5-year policy written on the annual renewal plan, is in accord with our construction. Hence, the refusal of the mortgagee to permit mortgagor to replace the original policy with a new one, under the circumstances set forth in this question, did not constitute violation by the mortgagee of the Commissioner's rules or the provisions of §627.92 and 643.04(10).

(2) This question is also answered in the negative, that is to say, that the described refusal of the mortgagee under the stated circumstances, did not constitute violation of the statutes and rules mentioned.

(3) If the factual situation is accepted as presenting the proposition of release and satisfaction of mortgagor "A's" indebtedness by the mortgagee, and the assumption of such debt by mortgagor "B", such would constitute a new transaction between the mortgagee and mortgagor "B", and would most likely be subject to the anti-coercive features of the mentioned statutes. However, in absence of a full disclosure of the contract terms existing between the mortgagee and mortgagors "A" and "B", and of the terms of the policy of insurance furnished by Mortgagor "A", we hesitate to more definitely answer this question.

October 16, 1953.—053-273.

LIMITED SURETY AGENTS—BAIL BONDS—EXECUTION

QUESTION: What bail bonds may be issued and/or countersigned by a "limited surety agent," as defined and contemplated by subsections .03(9) and .15(3), Ch. 28075, Laws of 1953?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Said subsection .03(9) provides that, "A 'Limited Surety Agent' is an individual appointed by a surety company, by power of attorney, to execute and/or countersign only bail bonds in connection with judicial proceedings."

Said subsection .15(3) is quoted: "The Commissioner may issue an agent's license to individuals qualifying therefor by taking and passing an examination limited to such subjects as relate to Limited Surety Agent as defined in §.03(9) of this Act."

In civil cases, "the term 'bail' is usually applied to those persons who become sureties or bind themselves either to satisfy plaintiff of his debt and costs or to surrender defendant into custody, pro-

vided judgment is against defendant in the action and he fails to satisfy it." (8 C.J.S. 5, Section 2a). Our court stated to like effect in *Varholy vs. Sweat, Fla., 15 So. 267, 269*: "The object of bail in civil cases is either directly or indirectly to secure the payment of a debt or other civil duty..." It is recognized that in this state one may not be imprisoned for debt, except in cases of fraud (Declaration of Rights, §16, Fla. Const.). However, there may be instances of bail in civil cases in our jurisdiction. For example, and not to the exclusion of possible others, the security given by a defendant in a ne exeat proceeding has been referred to as "bail" in one case (*State vs. Browne, Fla., 142 So. 247*) and in another as "nothing more than an appearance bond" (*Buonanno vs. Caldwell, Fla., 37 So. 2d 159*).

The function of a bail bond in a criminal case needs no extended explanation. Subject to the matters set forth in the succeeding paragraph, it may be said that a bail bond in a criminal case in this state is security given by a defendant to procure his release and conditioned upon his appearance at a given time and place in connection with proceedings involving a charge of violating a municipal ordinance with penal provisions, or violating a state or federal criminal law, including extradition proceedings.

Another function of a bail bond is found in those instances where it is given as security by a defendant who has been convicted or suffered an adverse court ruling and from which conviction or ruling he has appealed, the security being given to effect his release pending the outcome of the appeal.

In view of the foregoing, the above question is answered as follows:

Bail bonds which may be issued and/or countersigned by a "limited surety agent", as contemplated by the question, are described as follows:

The security given by a defendant in a civil or criminal proceeding, as described above, conditioned upon his appearance at a given time and place, which defendant but for the giving of such security would be detained in the custody of a law enforcement officer in pursuance of the commands of a civil writ, or warrant or other writ in a criminal case, or in pursuance of judgment entered in such a proceeding.

October 16, 1953.—053-276.

LIMITED SURETY AGENTS—PROFESSIONAL BONDSMEN— LICENSING BY CITY OF MIAMI—CH. 627, F.S., 1953

QUESTIONS: 1. Reference §2 of Ch. 28153, your opinion is requested as to what sections of Ch. 627 FS this section refers to. In this connection I wish to call your attention to the wording of §2, as follows: "Chapter 627 FS pertaining to limited surety agents."

2. Can you see any reason why the City of Miami cannot pass an ordinance licensing and regulating professional bondsmen as

long as the provisions of the ordinance do not minimize the restriction provided for in Ch. 28153 nor conflict with said Chapter?

To: *Honorable Milo F. Mitvalsky, Assistant City Attorney, City of Miami, Miami, Florida:*

As to question one, *supra*, it is clear that this section refers to §627.03(9) as provided for in Ch. 28075, Laws of Florida, 1953.

As to question two, *supra*, it seems good general law that a city may regulate an occupation also regulated by the state provided that there is no inconsistency or repugnancy in the regulation. See 62 C.J.S. pp. 592, 593. For an excellent discussion of the point, see *Atwater v. City of Sarasota*, 38 So. 2d 681.

October 19, 1953.—053-278.

INSURANCE—OCEAN MARINE RISKS—PLACING WITH NONADMITTED INSURERS

QUESTION: May ocean marine risks be placed directly with nonadmitted companies without the necessity of agents first submitting such risks to companies authorized to engage in business in this state?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

There are here involved provisions of §§627.55-627.70, F.S., as amended by Ch. 28002, Laws of 1953. These sections of our statutes were originally Ch. 25414, Laws of 1949, providing for the placing of fire, casualty or surety coverage on Florida risks with nonadmitted insurers through a "licensed supervisory general agent" or a "licensed agent," as defined and provided in said chapter.

Subsection 627.59(4) provides: "It is specifically understood and agreed that this section shall not apply to ocean marine or aviation risks of a class under the supervision and control of syndicate operations of insurers licensed to engage in business in this state such as the American hull syndicate, the Tugboat syndicate and other like constituted and recognized ocean marine or aviation syndicate operations."

Subsection 627.55(6) was amended by §1, Ch. 28002, Laws of 1953, which amended subsection is quoted: "'Fire, casualty, or surety insurance' shall mean fire and allied lines, marine, casualty or surety insurance including fidelity, guaranty and surety bonds and public liability and property damage insurance, but excluding ocean marine and aviation risks."

Since §627.59(4) pertains to "insurers licensed to engage in business in this state", there is no conflict between it and §627.55-(6), as amended; and since the question involves nonadmitted insurers, the provisions of §627.59(4) are not relevant thereto.

Subsection 627.59(1) sets forth the circumstances under which such a "licensed supervisory general agent" or "licensed agent", may place such insurance with a nonadmitted carrier. For the reasons below, such subsection is not of moment.

Chapter 28075, Laws of 1953, is the "Insurance Agents and Solicitors License Law". Subsection .03(1) provides that except where the type of insurance may be specifically defined, the word "insurance" wherever used in said act shall be held to include, among other lines, "marine" or "inland marine" insurance. It is evident that the quoted word "marine" is to be construed as meaning "ocean marine".

The effect of §.08 of the act is to make it unlawful, among other things, for any person to represent himself as an agent or solicitor unless licensed as such by this state; to directly or indirectly represent himself to be an agent of any insurer or solicitor for any agent without his having conformed to the licensing provisions of the act. Section .23 of the act provides in part that no insurer, as defined in subsection .03(2) of the act, shall issue any coverage contemplated by the act except through its regularly licensed insurance agents who hold a current valid license issued by the Insurance Commissioner of this state. The act did not repeal §627.22, F.S. This last-mentioned section makes it unlawful for any agent or solicitor, directly or indirectly, to collect any insurance premium or to solicit, negotiate, effect, procure, receive or forward any contract of insurance or renewal thereof for any insurance company not lawfully authorized to transact business in this state or in any manner to aid or assist in any such transaction.

Section .30 of Ch. 28075 provides that all laws and parts of laws in conflict therewith are repealed and certain named sections of Ch. 627 are expressly repealed. Said §§627.55-627.70 are not so specifically named as repealed. It is elementary that repeals by implication are not favored and will not be deemed to have been intended unless that intention is clearly manifest; that the legal presumption is that the Legislature did not intend to effect so important a measure as the repeal of a law without expressing an intent to do so. (*State vs. Gadsden County, Fla.*, 58 So. 232; *Dade County vs. City of Miami, Fla.*, 82 So. 354; *Voorhees vs. City of Miami, Fla.*, 199 So. 313.) In this connection it is to be recalled, as above-mentioned, that certain of the provisions of §§627.55-627.70 were amended at the 1953 session by Ch. 28002. Hence, reasonably it appears that Ch. 28075 does not repeal any of the provisions of §§627.55-627.70, F.S., as amended.

The effect of the above-mentioned laws is as follows: Ocean marine insurance, by the mentioned amendment of subsection 627.55-(6), is not included in the insurance which may be placed with a nonadmitted insurer in pursuance of the provisions of Sections 627.55-627.70, F.S., as amended by Ch. 28002, Laws of 1953. Ocean marine insurance is included in the mentioned insurance agents and solicitors license law. Hence, no "licensed supervisory general agent" or "licensed agent", as contemplated by said §§627.55-627.70, as amended, is authorized to place ocean marine coverage on Florida risks with a nonadmitted insurer. This being true, any attempt to answer the above question obviously is unnecessary.

October 9, 1953.—053-265.

INSURANCE—FIRE AND CASUALTY COMPANY OFFICER
OR EMPLOYEE—APPOINTMENT AS LICENSED
AGENT—ELIGIBILITY

QUESTION: May the president or other officer, corporate or appointed, of a fire and casualty insurance company be licensed as an agent for said company or any other fire and casualty insurance company of which he is not an officer, under Ch. 28075, Laws of 1953?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 28075 is an act dealing comprehensively with the licensing and regulating of agents representing, among others, fire and casualty companies. It becomes effective on October 1, 1953.

In opinions 046-43 (1945-46 Biennial Report 673) and 046-228 (1945-46 Biennial Report 672) my immediate predecessor in office held, among other things, that the officer of a fire, marine, casualty or surety insurer authorized to engage in business in this state properly could not be licensed under the laws of Florida as said insurer's resident agent; and that a person who worked approximately one half of his time as a special agent of such an insurance company on a salaried basis was not eligible to be licensed as its resident insurance agent.

The reasoning employed to arrive at such conclusions is set forth in the opinion first mentioned and is quoted as follows:

"A consideration of Sections 625.22, 627.07, and 627.08 leads to the reasonable conclusion that it was the legislative intent to express a rule of public policy that no person who, in connection with regular employment or business, performs services for and is compensated by insurers on a salaried or other basis unrelated to commissions or salaries payable to resident insurance agents for stock and mutual companies for the sale of contracts of insurance (in the manner and as contemplated by Sections 625.22 and 627.08) is qualified to be licensed as an insurance agent or solicitor in this state."

The pertinent part of §627.08 referred to above is as follows:

"No person employed by a fire, marine, casualty or surety insurer, on a salary basis or representing any such insurer in any capacity except primarily to solicit, negotiate or effect contracts of insurance, surety or indemnity, on a strictly commission basis, shall be deemed or held to be an insurance agent or solicitor."

As late as May 26, 1950, this office held in Opinion 050-257 (1949-50 Biennial Report 535), on the basis of the reasoning mentioned above that a director of a fire, marine, casualty or surety insurer, whether compensated or not, properly could not be licensed as a resident agent of said company. However, effective October 1, 1953, §627.08 will stand repealed, and there appears to be no provision in Ch. 28075 similar to it.

The pursuit of a legitimate trade, occupation or business is recognized as a natural, essential and inalienable right protected alike by state and federal constitutions, and is included in the constitutional guarantee of due process of law. See *Scully vs. Halliban, Ill.*, 6 N.E. 2d 176; *Paramount Enterprises vs. Mitchell, Fla.*, 140 So. 328. However, like other personal rights guaranteed by the constitution, it is subject to the exercise of the regulatory police powers of government.

Chapter 28075 is such a regulatory measure. Subsections (5) and (6) of Section .03 of Ch. 28075, in the definitions and provisions therein contained and set forth, would seem by reasonable implication to prohibit service representatives of companies, as defined, including supervising or managing general agents, as defined, from being licensed as agents of their respective companies. Beyond this, the provisions of Ch. 28075, in relation to the above question, do not appear to go; and the act is not to be given a broader construction than permitted by the apparent intent of its wording.

Attention is now directed to the question of whether, from the standpoint of public policy, there is such incompatibility between the position of officer or employee of an insurance company and the position of licensed agent for such company as to preclude such an officer or employee from being licensed as such an agent. We find that an insurance agent is the agent of the insurer he represents, as distinguished from being the agent for an insured (Subsection .03(3)(a), Ch. 28075). In other words, in so far as the public is concerned, the agent is the company he represents. This being true, reasonably there appears to be no such incompatibility referred to above in relation to public welfare.

In view of the foregoing, in my opinion the above question is answered as follows:

The president, other officer, representative or employee of a fire and casualty insurance company, with the exception of service representatives, including supervising or managing general agents, as defined in subsections (5) and (6) of §.03, Ch. 28075, Laws of 1953, may be licensed as an insurance agent of such company under the provisions of said Ch. 28075.

The president, other officer, representative or employee of a fire or casualty insurance company may be licensed as the insurance agent of a fire or casualty insurance company of which he is not the president, other officer, representative or employee, under the provisions of said Ch. 28075.

July 17, 1953.—053-156.

COUNTY SCHOOL BOARD—INSURANCE—PREMIUM RECEIPTS TAX—LIABILITY

QUESTION: Where a county school board purchases insurance coverage from a non-admitted insurer under the provisions of Sections 627.55-627.70, F.S. is said board liable for the payment of the premium receipts tax of 2% on the gross premium for said insurance, as provided by §627.63, F.S.?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Sections 627.55 to 627.70, F.S., authorize the placing of fire casualty or surety coverage of Florida risks with non-admitted carriers under the circumstances therein set forth, through licensed agents as provided.

Such insurance may not be written at a rate lower than the rate filed by a majority of admitted carriers, or provide coverage or policy forms other than as authorized by the insurance commissioner for admitted insurers; provided, it is permitted to procure extended coverage or windstorm insurance "at such tariff rates on such prescribed forms, using a deductible clause in excess of that filed by admitted insurers." (§627.59, F.S.) The premium charged for such insurance is subject to "a premium receipts tax of two per cent of the gross premium charged for such insurance and the amount of said tax shall be collected from the insured by the licensed agent"; that such agent "is prohibited from absorbing such tax, or any part of his commission on the premium, or, as an inducement for insurance or for any other reason, rebating all or any part of said tax or commission"; and that the agent shall be liable for and shall pay to the insurance commissioner such tax on or before March first of each year (§627.63, F.S.). The agent is required to furnish a \$5,000 bond conditioned, among other things, upon his accounting for and paying said premium receipts tax (§627.65, F.S.).

The 2% gross premium tax imposed by §205.43, F.S., on admitted foreign insurers is not a consumer's tax but an excise tax for the privilege of engaging in the insurance business in this state. E.G., *Orange State Oil Company v. Amos, Fla.*, 130 So. 707; *U.S. vs. Lee, Fla.*, 13 So. 2d 919. It is permitted that such a tax be measured by gross receipts. *City of Lakeland v. Amos, Fla.*, 143 So. 744. The tax imposed by §627.63, F.S. is a tax on the consumer, which in relation to the school board mentioned imposes a serious question.

Article IX, §1, Florida Consti. provides, among other things, for a uniform and equal rate of taxation excepting such property as may be exempted by law for municipal, educational, literary, scientific or charitable purposes. This provision has been held not applicable to excise taxes. *Jackson v. Neff, Fla.*, 60 So. 350, 238 U. S. 610, 59 L. Ed. 1488. Section 192.06, F.S. exempts from taxation all public property of the several counties, cities, villages, towns and school districts of the state used or intended for public purposes except lands sold for taxes for use of any such political entities. This statute is largely declaratory of existing legal principles independent of the statute. *Orange State Oil Company v. Amos, supra*; *Bancroft Inv. Company v. City of Jacksonville, Fla.*, 27 So. 2d 162.

We find in the general law that under the terms of particular statutes, privilege, sale or use taxes have been held applicable to sales to or purchases by a county, municipality or school district. 53 C.J.S. 558, Section 29b. In *People v. Imperial County, Cal.*, 173 P. 2d 362, there was involved a state sales tax law which specifically

made counties and other political subdivisions subject to it. Among other things, it was contended in said case that the source of the county's monies was taxation; that the sales tax law in effect constituted a levy on such public monies; and that the imposition of the tax on the county was contrary to public policy. The Supreme Court of California admitted that an attempt to levy ad valorem taxes on such a political subdivision was contrary to public policy but that the principle did not apply with respect to an excise tax. Practically the same argument was made in *Los Angeles City High School District v. State Board of Equalization, Cal.*, 163 P. 2d 45; and the court upheld the sales tax law by the same reasoning.

It may be that a statute which specifically makes political subdivisions of the state subject to an excise tax are valid. Attention is directed to the fact that our court has held that a municipality may be made subject to an excise tax. *City of West Palm Beach v. Amos, Fla.*, 130 So. 710; *State v. Cahoon, Fla.*, 143 So. 253. Further, it is significant that our sales tax law as originally enacted (Ch. 26319, Laws of 1949; Ch. 212, F.S.), specifically exempted sales to the state and any county, municipality or political subdivision thereof; and that by virtue of §320.10, F.S., such governmental units are exempt from payment of license fees for motor vehicles. However, it has further been held that a statute imposing license fees should not be applied to public agencies unless the intention so to do is clearly expressed. 53 C.J.S. 558, Section 29b; *Marion Municipal Water Dist. v. Chenu, Cal.*, 207 P. 251.

The effect of the mentioned requirements with respect to policy forms and rates to be used in connection with policies issued by a non-admitted insurer under said §§627.55-627.70, is to assure that admitted insurers shall not be placed in an unfavorable position with respect to rates; and it is recognized that in the fixing of rates for admitted insurers, the 2% tax imposed by §205.43, F.S. is an expense factor taken into consideration. Thus, the 2% tax imposed by §627.63, F.S., is in excess of the premium rate admitted carriers charge for the same risk. Hence, relieving this county school board of the payment of that tax will not result in a rate less than the rate which is charged by an admitted carrier.

There is a similarity between the tax imposed by §627.63, F.S., and the mechanics of its collection, and the gasoline taxes imposed by §208.04, F.S.; however, the construction of the effect of the latter section by our Court in *U.S. v. Lee, supra*, results in differences that distinguish the two. The relevant part of §208.04 is quoted:

"An excise or license tax of six cents per gallon, herein termed 'gas tax,' is imposed upon every gallon of gasoline, or other like products of petroleum, sold in this state, upon which such tax has not been paid or the payment thereof not lawfully assumed by some person handling the same in this state. This levy of tax is upon the consumer but shall be paid upon the first sale or transfer within this state whether by a distributor or dealer, such distributor or dealer shall act as agent for the state in the collection of said tax whether he be the ultimate seller or not. Upon

the payment or lawful assumption of the tax by the distributor or dealer, the amount of the tax paid or assumed may be added to the sales price of the product sold, and the amount of the tax may be stated separately from the price of the product on all price display signs, sales or delivery slips, bills or statements which advertise or indicate the price of the product..."

In the mentioned case, among other things the Court stated:

"In answer to the contention that Chapter 18298, Acts of 1937, made the tax in question a consumer tax, it is sufficient to say that the 1937 Act has been superseded by Section 208.04, Florida Statutes of 1941, which made the adding of the tax to the sales price permissive. This prerogative was granted to the dealer and is inconsistent with the theory of a consumer tax. This act in no way changed the incidents of the tax or the course of its administration. We have given due consideration to the cases cited on this point by appellant but they all appear to be those affecting statutes imposing the tax on the use of the gasoline, or requiring that it be collected from the consumer, or by the very manner of administration the tax is paid by the consumer.

"The only other contention we feel required to answer is the charge that when the dealer exercises his authority, the effect is to impose the tax on the consumer. The test applied in the cases cited is not whether or not the consumer ultimately pays the tax, but whether the law in terms imposes the tax on him or requires him to pay it in the manner that he pays labor, rent, insurance, or overhead expenses in general. If in paying the price of gasoline, he pays sufficient margin to the dealer to make up his overhead, it does not amount to a tax on the consumer."

A reasonable construction of these remarks of the Court would appear to result in the tax imposed by §627.63, F.S. being classified as a tax imposed upon the purchaser of the policy.

This office has held in times past that the excise tax on documents (Ch. 201, F.S.) is not applicable to documents executed by the State or its political subdivisions; and it is to be noted that there is no exemption of the State or political subdivisions in said law.

In view of the foregoing, in my opinion the question is properly answered as follows:

Whether or not a county school board could be required to pay an excise tax such as here found if the statute specifically included political subdivisions of the state (other than municipalities) in its coverage, is a question which we do not attempt to answer. It is felt, however, that in the absence of §627.63, F.S. specifically including such political subdivisions along with other insureds in relation to the 2% premium tax required, the statute should be construed as not being applicable thereto. Hence, this

question is answered in the negative; that is to say, that said school board is not liable for the payment of the premium receipts tax of 2% on the gross premium for the insurance involved, as provided by §627.63, F.S.

January 30, 1953.—053-20.

**ADJUSTER—LICENSED SUPERVISORY GENERAL AGENT—
CHAPTERS 627, 635, F.S.**

QUESTION: Properly may a person who is a licensed insurance adjuster under Ch. 636, F.S., also act as "supervising general agent" for an admitted insurer engaged in the business of fire and allied lines of insurance, and also be licensed under §§627.55 to 627.70, both inclusive, F.S., as a "licensed supervisory general agent"?

To: Honorable J. Edwin Larson, Insurance Commissioner, Tallahassee, Florida:

It is here assumed that the words "supervising general agent" as used in the question are to be construed as meaning a general agent as distinguished from a licensed resident agent for an admitted insurer.

On September 7, 1948, my immediate predecessor in office, in opinion 048-290 (1947-48 Biennial Report, page 538), held that properly a licensed resident agent for an admitted company might be issued a license as an adjuster under Ch. 23966, Laws of 1947 (now Ch. 636, F.S.).

Sections 627.55-627.70, F.S., deal with the licensing of supervisory general agents and resident agents to place coverage on Florida risks with non-admitted insurers under the conditions set forth in such sections.

It appears that there has been no change in the laws which were considered in connection with said former opinion 048-290, and such opinion is here adhered to. It further appears that there is nothing in Ch. 636 and §§627.55-627.70, which precludes a person acting at the same time as an insurance adjuster, a general agent for an admitted insurer, and a licensed supervisory general agent within the contemplation of §§627.55-627.70.

Hence, the question is answered in the affirmative.

LIFE INSURANCE, GENERALLY

November 24, 1954.—054-251.

**INSURANCE CONTRACTS—INVESTMENT PLANS
—VIOLATIONS**

QUESTION: Lawfully may salesmen who are not insurance agents in Florida for the United States Life Insurance Company or Continental Assurance Company, sell to subscribers in this state "The Putnam Plan—with life insurance"?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Inquiry has developed that both of the insurance companies mentioned in the question are duly admitted to engage in business in this state. There has been delivered to us only the form of policy of United States Life Insurance Company furnishing the group coverage required by the mentioned plan. It is assumed that the contract issued or to be issued by Continental Assurance Company, also named as one of the insurers furnishing this coverage, will be similar in terms to the form of contract delivered to us. At this point it is relevant to observe that because of the amount of coverage provided by these insurance contracts such companies, although authorized to engage in business in this state, properly could not issue Florida contracts furnishing this coverage because of the provisions of §635.24(2) (d), F.S.

In times past this office has been called upon to inquire into the regularity of the furnishing of insurance coverage in connection with investment plans, under master policies issued in another state. In this connection see copies of opinions 051-311, 051-419 and 054-76, attached hereto. The investment plan with this insurance feature here considered, with the exception noted, is very similar to the plan discussed in said opinion 054-76. Hence, it is unnecessary to further describe the plan with its insurance feature beyond the details set forth below herein. Neither is it necessary to burden this opinion with the legal authorities and conclusions based thereon appearing in said attached copies of opinions.

An examination of the form of policy which accompanied the request for opinion evidences the following provision:

"ENTIRE CONTRACT: This policy, the application of the Creditor and the individual applications, if any, of the purchasers insured shall constitute the entire contract between the parties, and no statement made by the Creditor or any purchaser or on their behalf shall be used in defense to a claim under this policy unless contained in a written application." (Emphasis supplied.)

In view of the foregoing, in my opinion the question is answered as follows:

On the basis of the law and legal conclusions reached with respect to the plans dealt with in said attached copies of opinions, the inclusion of applications of individual purchasers of this plan as a part of the insurance contract results in the following: (1) Said insurance contract, to the extent that it furnishes coverage for any such Florida purchaser, is a Florida contract and, as stated above, not authorized to be issued under the laws of this state. (2) The activities of salesmen in Florida soliciting subscribers to this plan with its insurance feature, the applications for such insurance becoming a part of the insurance contract, constitute the activities which properly may be engaged in only by a Florida insurance agent for one or the other of these companies, even were it conceded that the form of contract lawfully might be issued in Florida. (3) By reason of the foregoing, the question is answered in the negative, that is to say, persons representing this plan and selling it in Florida would be in violation of our insurance laws.

SICK AND FUNERAL BENEFIT INSURANCE

March 24, 1954.—054-74.

INSURANCE COMMISSIONER—RELEASE OF SECURITIES
DEPOSITED UNDER CH. 638, F.S.

QUESTION: Where a domestic insurance company heretofore operating under Ch. 638, F.S., deposited with the Insurance Commissioner under §638.03, F.S. securities of the present approximate value of \$54,000, and which company has since increased its capital to not less than \$100,000, as required by §638.02, F.S., and is now qualified as a full life insurer under the appropriate insurance laws, is the Insurance Commissioner authorized to return such deposit to said insurance company?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Section 638.02, F.S., originally required paid in capital stock of such insurer in an amount of not less than \$25,000. The section was amended by Ch. 23671, Laws of Florida, 1947, increasing the amount of such capital stock to \$50,000. The section was further amended by Ch. 25404, Laws of Florida, 1949, requiring increase in such capital to \$75,000 by January 1, 1951, and to \$100,000 by January 1, 1953.

Section 638.03 F.S., originally required a deposit with the Insurance Commissioner of "five thousand dollars in cash or in bonds of the United States or of any of the counties or municipalities of this state, acceptable to the insurance commissioner, *to be held by him in trust for the protection of the lawful claims of policyholders of this state.*" (Emphasis supplied.) This section was amended by Ch. 21845, Laws of Florida, 1943, requiring increase of said deposit to \$25,000 by August 1, 1943.

A part of §638.01, F.S., provides that, "... life insurance companies organized under the laws of this state which have qualified and obtained a certificate to do life insurance business in this state may receive a certificate to do sick and funeral benefit insurance business in this state in accordance with the provisions of this chapter without further qualifying."

Section 638.14, F.S., provides as follows:

"The provisions of this chapter shall not apply to any bona fide fraternal or secret society or lodge which, under the supervision and authority of a recognized grand or supreme lodge, shall in good faith procure membership through the lodge system exclusively, and provide insurance to its members; *neither shall this chapter affect the status and rights of life and accident insurance companies now or that may hereafter be authorized to do business in this state under the regular insurance laws.*" (Emphasis supplied.)

These mentioned sections are construed as exempting authorized life companies from the qualifying requirements of Ch. 638.

Before considering other aspects of the question, the inquiry reasonably arises as to whether, in any event, the company is entitled to that part of the deposit in excess of the value of \$25,000, the statutory amount required. It has been held in some jurisdictions that withdrawal or substitution of an insurer's deposit will not be permitted when the rights of policyholders may be jeopardized thereby; and even though the aggregate amount of the securities deposited exceeds the minimum required by law, the custodian of such deposit is not required to surrender the surplus, nor will a court require such surrender except as authorized by law. See *Hayne vs. Metropolitan Trust Co.*, Minn., 69 N.W. 916; *Lancashire Insurance Co. vs. Maxwell*, N.Y., 30 N.E. 192. The Supreme Court of another state has held that the fact that such a deposit as a guaranty for the payment of policies is not required by statute, does not affect the trust character of the fund. *State vs. American Bonding & Casualty Co.*, Ia., 221 N.W. 585. Even were it not for these supporting authorities, it would be our holding that a deposit in excess of the minimum requirements of \$638.03 would not, as to such excess, constitute a *voluntary* deposit (i.e., not provided by statute), but that such excess so deposited, in absence of demonstrated error or mistake in connection with the deposit, would be authorized and charged with the trust created by said section.

Attention is now directed to the statement in the request for opinion "that the company now meets the statutory requirements to do a life insurance business as distinguished from a sick and funeral benefit business." We accept that statement and construe it to mean that the company is now a duly authorized and qualified domestic life company in this state. This opinion is conditioned upon such assumption. As such a qualified company it is further assumed that it is now obligated with respect to policies which generally may be grouped into two classifications in relation to time of issuance, as follows: (1) those policies issued during the period when the company was operating in pursuance of Ch. 638; and (2) those policies issued subsequent to the date it became a full life company.

Had this company been originally organized and qualified as a full life company, it would never have been required to make the deposit. If it now operates as such a fully qualified company, the deposit is not charged with the trust in relation to policies issued since it so qualified. Thus we are confronted with this very controversial question: At the time the deposit was made, did not the provisions of Ch. 638 contemplate that if the company should qualify as a full life company that the trust would be discharged? Only the courts in a proper proceeding may decide that question with finality; and in view of the respectable argument which can be made that the trust has not been discharged, ordinary caution dictates that the Insurance Commissioner assume the position that the deposit is still charged with the trust in relation to policies issued by the company during the period it was operating in pursuance of Ch. 638.

In view of the foregoing, in my opinion the question is answered as follows:

Unless and until the courts shall rule otherwise, the Insurance Commissioner shall retain in his possession said deposit or so much thereof as shall not be less in value than the aggregate liability, contingent or otherwise, of the company with respect to policies issued by it in pursuance of the provisions of Ch. 638, F.S., and during the period prior to the date the company qualified as a domestic life insurer, as aforesaid.

February 19, 1953.—053-40.

DOMESTIC INSURER—PREFERRED STOCK—PROPRIETY
OF AMENDING CHARTER—CHAPTERS 611, 638, F. S.

QUESTION: May a domestic insurance company (originally organized to carry on the business of insurance authorized and contemplated by Ch. 638, F.S.) with \$100,000 par value paid-in capital stock, amend its charter to authorize it to issue \$200,000 par value preferred stock?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

There appears to be no provision in the insurance laws of this state relating to this question. Hence, reference is made to Ch. 611, F.S., dealing with the certain corporations for profit, including insurance companies, and particularly §611.06 thereof. The following quoted part of the mentioned section is relevant:

"Every corporation may create two or more kinds of stock of such classes, with such designations, preferences, and voting powers, or restriction or qualifications thereof, as shall be stated and expressed in the charter; and may increase or decrease the stock, as is provided by law; but at no time shall the total amount of the preferred stock exceed two-thirds of the actual capital paid in cash or property; and such preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate thereof, and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend to be expressed in the certificate, not exceeding eight per cent payable quarterly, half yearly or yearly, before any dividends shall be set apart or paid on the common stock, and such dividends may be made cumulative;..."

It appears that if this insurance company were a new corporation, it could provide for the required amount of common stock and preferred stock, as specified in §611.06, provided that the total amount of the preferred stock (i.e., par value thereof) did not exceed two-thirds of the actual capital (i.e., the actual paid-in capital). Argument might be made that since the paid-in capital at this time is \$100,000, the par value of permissible preferred stock issuable, in pursuance of amendment, should not exceed one-third of that figure. We cannot agree with such construction, and consider the better position to be that, in pursuance of amendment, authority may be granted this company to issue \$200,000 par value preferred stock, which par value will not exceed two-thirds of the actual paid-in capital when such preferred stock is issued.

Hence, the question is answered in the affirmative.

While no specific question was asked concerning certain other features relevant to this proposed amendment and issuance of stock, it is considered appropriate to make certain further suggestions: (1) When the company gets ready to issue and sell this preferred stock, to remove all doubt concerning possible application of Ch. 517, F.S., such proposed issuance and sale should be cleared with Florida Securities Commission. (2) The words in the quoted part of §611.06, "and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend not exceeding eight per cent..." are construed to mean that *the interest figure mentioned is related to the par value expressed in the face of the certificates evidencing such preferred stock*. This is mentioned for the reason that it is not unusual in issuance of stock by an insurance company to require payment greater than the par value, the excess to go into surplus.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

November 9, 1954.—054-247.

INSURANCE—VOLUNTARY BENEVOLENT OR RELIEF ASSOCIATION—EMPLOYEES OF AN EMPLOYER— AMERICAN SUMATRA TOBACCO CORPORATION

QUESTION: Would the operation of the proposed health and accident plan for the employees of American Sumatra Tobacco Corporation, as described below herein, constitute the business of insurance and, hence, be subject to the insurance laws of Florida relating to such type of coverage?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The proposed plan is one which the corporation would like to see established to improve the health and living standards of its employees. We assume the plan is to be instituted in this state and applicable with respect to Florida employees in Florida employment. The plan is explained as follows:

(1) The plan would cover the employees of the corporation and their immediate family, that is, any unemployed husbands or wife and minor children. (2) Payments would be made by the employees voluntarily and these payments would be deposited in a fund to be administered by a board composed of individuals employed by the corporation; and said corporation would underwrite the fund. (3) In return for the employee's payments into the fund, which would be made as payroll deductions, the employee and family would be provided medical treatment and hospital treatment by designated doctors and at designated hospitals. (4) The plan could be voluntarily discontinued by either the employer or employee upon reasonable notice (probably thirty days) and would automatically be terminated upon the conclusion of employment of any employee. (5) There would be no coverage under the plan if the employee is protected by Workmen's Compensation insurance. (6) There would in all probability be a top limit of the amount

to be expended in an annual period for an individual. (7) The board would meet annually to establish required payments for the ensuing year and if there should be a surplus in the fund a distribution would be made to the participants; the participants, however, would have no vested rights in the fund. (8) While it would not be necessary to issue a policy, certificate or contract in administering the plan, it would be necessary to have rules and regulations and there would exist certain contractual obligations between the employer and employee.

On various occasions this office has been called upon to determine if a plan of operation or contract constituted an insurance operation or an insurance contract. Reference is made to certain of these: Opinion 052-124 (1951-52 Biennial Report, 644); Opinion 052-294 (1951-52 Biennial Report, 651); Opinion 052-222 (1951-52 Biennial Report, 680); Opinions 053-49, 053-107 and 054-49.

A review of these mentioned opinions will disclose that in each instance the question turned upon whether there was involved an insurable risk with respect to which some person was indemnified upon the happening of a contingency. It is to be observed that the word "indemnified" connotes the existence of an enforceable contract of indemnity. A definition of what constitutes an insurance contract, and hence the business of insurance, is found in the case of *State vs. DeWitt C. Jones Co., Fla., 147 So. 230*, wherein the State referred to a contract of insurance as one "whereby, for an agreed premium, one party undertakes to compensate another for loss on a specified subject by specified perils." It is to be noted that in that case the court differentiated between the plan of operation dealt with and certain philanthropic and charitable associations; and with respect to such associations quoted at length from *State ex rel Attorney General Sheets vs. Pittsburg C.C. & St. L. R. Co., Ohio, 67 N.E. 93*. In commenting on that case our Court stated: "In that case the court was considering a *voluntary* relief department of the railroad company, the members of which were mere volunteers and were employees of said railroad company. It is to be noted that neither the railroad company nor the relief department was operating said department for profit, and did not, through agents or otherwise, solicit business from the general public. The court specifically states that the relief department did not 'undertake to insure or indemnify against either sickness, accident or death.'" (Emphasis supplied.) Generally, for further distinctive characteristics of such a relief department or association, see: *Couch on Insurance, Vol. 1, 23*; *Commonwealth vs. Equitable Benevolent Association, Pa., 18 A. 1112*; *Burlington Relief Dept. vs. White, Neb., 59 N.W. 747*.

In my judgment the proposed undertaking of the employer corporation to underwrite the plan does not transform it from its character as a voluntary relief fund or association into an insurance enterprise. This employer as a part of the terms of employment could have agreed to furnish medical care and attention for its employees; and the underwriting of the fund by the corporation will constitute an undertaking of a similar nature.

In my opinion the question is answered as follows:

The proposed plan contemplated by the question appears to fall within the category of relief funds or associations as above-described. When the plan is formally adopted (i.e., charter or other written form) it is suggested that it be so clearly worded that all participants under the plan shall understand that participation therein is voluntary and that the participants have no vested interest in the funds accrued under the plan, either for claimed benefits payable or for claimed portions if a distribution of surplus is made; that is to say, that no participant, and no other person, shall be possessed of a cause of action based upon a claim for any such benefits or distributable portion of surplus.

ACCIDENT AND SICKNESS INSURANCE

September 30, 1953.—053-261.

INSURANCE—BLANKET COVERAGE OF SCHOOLS —VIOLATIONS

QUESTION: In view of the provisions of the "Insurance Agents and Solicitors License Law" (Ch. 28075, Laws of 1953) and the "Insurance Adjusters Act" (Ch. 28074, Laws of 1953) do the activities of classroom teachers in public schools in connection with blanket coverage covering students and/or teachers and issued in pursuance of §642.06(3) constitute violations of said agents or adjusters acts or either of them?

To: Honorable J. Edwin Larson, Insurance Commissioner:

At the outset it is remarked that said §642.06 was amended by §2 of Ch. 28006, Laws of 1953, which amendment in no way varies the intent of the previous law in relation to the above question.

Attached to the request for opinion is a list of instructions issued to school principals in connection with such coverage, which are quoted as follows:

INSTRUCTIONS FOR ENROLLING STUDENTS UNDER BLANKET OR GROUP ACCIDENT INSURANCE PLAN

1. Place in each home room three copies of the form headed List of Insureds and a supply of identification cards.

2. When students and teachers pay their premiums, enter names and dates of payment upon the form headed List of Insureds. The teacher is to make three identical copies of this List. Carbon copies are satisfactory. AS NAMES ARE ENTERED ATTACH THE PREMIUM ENVELOPE TO LISTS.

3. Give each person paying a premium an identification card. (In states in which group policies are required a certificate will also be issued and sent to the school for delivery to the child.)

4. At the close of the collection period the teacher

should check the three copies of the list to make sure they are identical, balance the money against the number so listed and turn all copies and the money over to the school principal or superintendent.

5. The principal or superintendent balances the money with the listed names and submits the completed lists (IN DUPLICATE) to the representatives of the Insurance Company. The premium envelopes are to be attached to the copies going to the representative of the insurance company. One copy of the list of insureds is retained by the principal or superintendent for their permanent record and reference.

CLAIMS:

1. When an accident is reported to the school, the principal or superintendent should complete the Policyholder's Certificate (which is a portion of the claim blank) so as to identify the child and show how and when the accident happened. It is important that the name of the school or school system be shown on the Policyholder's Certificate in the identical manner as the name shown on the Master Policy. The policy number of the Master policy should be shown.

2. After this certificate has been completed and signed, the claim blank should be sent to the parent or legal guardian of the injured child who will follow the instructions shown on the back of the blank as to completing and filing the claim with the representative of the insurance company.

In view of the foregoing, in my opinion the above question is answered as follows:

The activities of principals and school teachers as reflected above in connection with said blanket coverage do not conflict with any provisions of the mentioned agents' or adjusters' acts.

May 18, 1953.—053-107.

INSURANCE—HOSPITALIZATION PLAN—KEY WEST HOSPITALIZATION ASSOCIATION

QUESTION: Does a plan which has for its purpose the furnishing to card-holding members of sick and accident and hospitalization benefits by a corporate medical association operating a hospital in this state, as described below, constitute the business of insurance?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

The facts set forth below are taken from a report of an employee of the Insurance Department and from data attached to the request for opinion.

The plan appears to have come into existence with the execution of an agreement between the corporate medical association (hereinafter referred to as "association") and two individuals

(hereinafter referred to as "promoters"). Summarized sufficiently for instant purposes, the agreement provides for sale by the promoters to persons of certain medical, surgical and hospital benefits, for a consideration, such benefits to be furnished by the association; that of the money collected weekly by the promoters, 50% is retained by them and 50% paid to the association; and that persons purchasing such benefits are issued a card.

It appears that the promoters do business as "Key West Hospitalization Association"; that the card issued to a purchaser is designated "Membership Card"; that in connection with the plan there is issued a folder setting forth benefits provided for hospitalization, accidents, operations, sickness and childbirth, including detailed "Schedule of Operations", with respective amounts of benefits for each type listed. Also on said folder is set forth, "Rates With Surgery"; men, 18 to 75, 60¢ weekly; women, 18 to 75, 60¢ weekly; children up to 18, 30¢ weekly.

It must be borne in mind that police regulations, as well as all other laws, must be applied and observed impartially throughout the governmental unit adopting them. Hence, no matter how meritorious this plan is, if it constitutes the business of insurance it must yield to the statutory requirements regulating such business.

From time to time this office has been called upon to advise if a plan of operation or contract constitutes the business of insurance or an insurance contract. Examples of these are mentioned.

In opinion 052-124 (1951-52 Biennial Report 644), it was held that an organization limited to members of a certain fraternal order within specified territorial boundaries, proposing to issue to members certificates providing death benefits to beneficiaries up to \$1,000, depending upon number of members, the members paying an initial fee, fixed according to age, and subject to assessment upon death of a member, would constitute engaging in the business of insurance. In opinion 052-294 (1951-52 Biennial Report 651), it was held that an agreement sought to be issued by an organization to owners of television sets, whereby for a stated consideration it was provided that upon failure by ordinary use of a picture tube in such a set, same would be repaired or a new or reconditioned one installed, was a contract of insurance. Opinion 052-222 (1951-52 Biennial Report 680), dealt with an agreement issued by a cemetery company to purchasers of cemetery lots on the instalment plan, wherein it was provided that upon death of the purchaser before completion of payments, a named beneficiary would be furnished not only a cemetery lot and other items in connection with interment of the deceased purchaser, but also reimbursement of all payments made by the purchaser prior to death; and such agreement was held to be a contract of insurance.

Intentionally the three examples given deal with different situations and risks and are illustrative of the proposition that the question is not particularly the nature of the risk but whether with respect to an insurable risk someone is indemnified upon the happening of a contingency. A clear definition of what constitutes an insurance contract, hence the business of insurance, is quoted

from *State vs. DeWitt C. Jones Co.* (Fla.) 147 So. 230, wherein the Court referred to the fact that Bouvier's Law Dictionary defines an insurance contract to be one "whereby, for an agreed premium, one party undertakes to compensate another for loss on a specified subject by specified perils." That mentioned case is very much in point. It was held therein that a funeral service contract, calling for annual dues and assessments, was a "sick and funeral insurance contract" within the meaning of regulatory statutes. In the case the Court differentiated between the business therein found and certain philanthropic and charitable associations, such as employees' relief departments of organizations.

We dealt with such a relief association in opinion 053-49, dated March 5, 1953, directed to the Insurance Commissioner. Generally, for distinctive characteristics of such associations see: *Couch on Insurance*, Vol. 1, Section 23; *Commonwealth vs. Equitable Ben. Asso.* (Pa.) 18 Atl. 1112; *Wolfstern vs. P. R. Relief Dept.* (N. J.) 74 Atl. 533; *Burlington Relief Dept. vs. White* (Neb.) 59 N.W. 747. The plan of operation here involved does not fall within the category of such relief association.

Conventionally an insurer issuing a sick and accident policy collects the premium and, as required by the contract provisions, pays the benefits when they become due. Here, the part of the "premium" to pay the benefits is paid directly to the association. We cannot see that this difference is material.

In view of the foregoing, in my opinion the above question is answered as follows:

The above plan for the furnishing of hospitalization, medical and surgical benefits constitutes the business of insurance, and should be terminated unless the statutory provisions relating to the business of accident and sickness insurance are complied with fully.

BURIAL INSURANCE AND CONTRACTS

July 1, 1954.—054-155.

BURIAL SUPPLIES AND SERVICES—AGREEMENT TO SELL —PRE-NEED BURIAL CONTRACT LAW NOT APPLICABLE

QUESTION: Does the "agreement," a copy of which was attached to the request for this opinion, come within the meaning of the pre-need burial contract law (§639.06-639.17, F.S., 1953) so as to subject the corporation offering to write such agreements to the regulatory provisions of the law?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The agreement in question is practically identical to that which is described at length in Opinion 052-281 which was directed to you by this office on September 29, 1952. Due to this similarity, it is not necessary to describe the agreement here. A copy of Opinion 052-281 is attached hereto for your immediate reference.

The provisions of §639.06-639.17, F.S., apply generally to persons who hold funds "received from the sale of or from a contract to sell, burial supplies and equipment and funeral services, or any one or combination of them, where payments for same are made either outright or on an installment basis, prior to the demise of the person or persons so purchasing them, or for whom they are purchased..." (§639.06, F.S.). Contracts for the advance or pre-need sale of burial supplies and services are referred to in this law as pre-need burial contracts and are defined in §639.07 as follows:

"'Pre-need burial contract' means any contract, other than a contract of insurance, under which, for a specified consideration paid in advance in a lump sum or by installments, a person promises, upon the death of a beneficiary named or implied in the contract, to furnish funeral services or burial supplies and equipment".

According to this definition and the purpose of the act as revealed in §639.06, the provisions of the law would not apply to a sale of burial supplies and services unless the sale was made (or a contract to sell entered into) prior to the death of the person for whose benefit the purchase was intended. Since there is no completed contract of sale involved in the agreement, it would come within the provision of this law only if there were a completed contract, entered into some time before the goods and services would be needed, under the terms of which one party agreed for consideration to sell and the other, also for consideration, to buy the specified goods and services upon the death of the person for whom they were intended.

It is not felt that such could be the intent of the parties signing the agreement in question. The purchaser who signs the agreement does not agree to buy the goods and services named therein, and the secondary beneficiary whom he names is under no obligation to buy them either. The decision on the part of the secondary beneficiary as to whether they should be bought is not made until after the death of the purchaser who made the agreement. Only then are the funds of the policy on the purchaser's life made available to the secondary beneficiary.

Since there is no contract to sell which is equally binding on both parties, it must be concluded that there is nothing more involved here than an offer to sell burial needs for a contingent amount which is determined by the amount of the policy proceeds that may remain after the balance of the purchase price of the cemetery plot has been paid. (See discussion in Opinion 052-281) The so-called secondary beneficiary is a third party to this agreement and gives nothing which could be termed consideration for the offer to sell the burial goods and services at the prices stated. There is no immediately apparent reason why the offer could not be withdrawn at any time prior to its acceptance by the secondary beneficiary.

The other aspects of the agreement, having to do with the procurement of a term life insurance policy on the life of the pur-

chaser of a cemetery plot, have no connection with the matter intended to be regulated by §639.06-639.17, F.S.

Upon consideration of the foregoing, it is my opinion that the agreement does not constitute a pre-need burial contract within the definition of §639.07 and that your question should therefore be answered in the negative.

CHAPTER XXXVI

BANKS AND BANKING

BANKING REGULATIONS

March 19, 1954.—054-71.

ESTATES BY THE ENTIRETY—PERSONAL PROPERTY —INVESTMENTS IN CREDIT UNIONS

QUESTIONS: 1. What language is necessary to establish an estate by the entirety of money invested in a Credit Union in this State?

2. Is it possible to arrange the investment in such a way that the signature of either the husband or wife will be sufficient to make withdrawals during their joint lives?

To: Honorable C. M. Gay, State Comptroller, Tallahassee:

Under the laws of this State an estate by the entirety may exist in personal property as well as in real property (Bailey v. Smith, 89 Fla. 303, 103 So. 833; American Central Insurance Company v. Whitlock, 122 Fla. 363, 165 So. 380; Merrill v. Adkins, 131 Fla. 478, 180 So. 41; Hagerty v. Hagerty, Fla., 52 So. 2d 432). An estate by the entirety may exist in a bank deposit (Hagerty v. Hagerty, supra). Estates by the entireties are vested in husband and wife as a marital unit (Stanley v. Powers, 123 Fla. 359, 166 So. 843) with no separate interest in either. Unities of possession interest and person are peculiar to estates by the entireties (Hagerty v. Hagerty, supra). Deposits in banks in names of husband and wife, signing signature cards authorizing either, both or survivor to sign checks on account creates estates by entireties (Hagerty v. Hagerty, supra). A mortgage to husband and wife as mortgagees may create an estate by the entirety (Powell v. Metz., Fla., 55 So. 2d 915). Neither spouse may alien, forfeit or otherwise dispose of an estate by the entirety, or any part thereof, without the joint consent of the other (Rader v. First National Bank, Fla., 42 So. 2d 1). The interest of each spouse in an estate by the entirety is to the whole and not to a share, moiety or divisible part (Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205). As to estates by the entirety in bank accounts see 41 C.J.S. 486 et seq., Section 35. As a general rule a wife may be the agent or attorney in fact for her husband (41 C.J.S. 536, et seq., Section 65) and likewise the husband for his wife (41 C.J.S. 545, Section 68).

Attention is directed to §653.16, F.S. relative to the payment of deposits made in regular banking institutions and other institutions therein named, although Credit Unions may not be within the purview of said statute, which statute may be declaratory of the general rule in this State.

We, therefore, hold that estates by the entireties may be created in moneys deposited or invested in Credit Unions in this State when clearly evidenced by the contract setting up such deposit or investment. Any language sufficient to show an intent on the part of a depositor or investor to create an estate by the entirety and the acceptance of such intention by the Credit Union will be sufficient to establish such an estate. A deposit or an investment in the name of the husband and wife stating that the same was to constitute an estate by the entirety would seem to be sufficient to create the estate. This answers the first question.

The second question is answered in the affirmative, with a reference to the opinion in the case of *Hagerty v. Hagerty*, *supra*, for such a case.

CHAPTER XXXIX

REAL AND PERSONAL PROPERTY

CONVEYANCES OF LAND AND DECLARATIONS OF TRUST

January 22, 1953.—053-12.

MONROE COUNTY SCHOOL BOARD—REAL ESTATE GIFT—KEY WEST, CITY OF §689.18(5), F.S.

QUESTION: Does the county school board of Monroe county have authority to accept a gift of real estate from the city of Key West if the deed to said property contains a reversionary clause limiting the use of the land to playground purposes?

To: Honorable M. Ignatious Lester, City Attorney, Key West, Monroe County, Florida:

I know of no reason why the school board could not accept the land under these circumstances. Your attention is called to §689.18-(5), F.S., which exempts conveyances to governmental agencies from the restrictions contained in other sections of this law imposed on reverter clauses in deeds to real estate.

If the board should accept the land, it would not be authorized to expend school capital outlay funds for buildings or permanent non-removable construction on this site, since its ownership is not complete and irrevocable. It could, however, expend a reasonable amount of school funds for development of the property for playground purposes to be used for the benefit of the schools and not for the general public. See §§9 and 13, Art. XII, Florida Constitution. Subject to the above comment, your question is answered in the affirmative.

RECORD OF CONTRACTS; PHOTOGRAPHIC RECORDING

September 11, 1953.—053-238.

CLERK'S FEES—RECORDING OF SATISFACTION AND MORTGAGES

QUESTIONS: 1. Where the satisfaction of a mortgage, lien, judgment, decree, etc. is recorded, pursuant to §696.05, F.S., 1951, is the Clerk, by reason of §28.21(9) and 28.22(5), F.S., 1951, which require him to "... enter a note of the satisfaction on the margin of the record..." of the mortgage, lien, judgment or decree, entitled to a fee in addition to that for recording the instrument?

2. Does §696.05, F.S., 1951, by use of the language "... which shall include the cost of indexing the record of such instrument ...", after providing for a fee for such recording, preclude any additional fee for indexing the recorded instrument regardless of the number of entries which may be required to properly index the same?

To: Honorable Arthur W. Newell, Clerk of the Circuit Court, Orange County, Orlando, Florida:

AS TO QUESTION ONE

The Clerk is entitled to the fee prescribed for recording any paper, which is twenty-five cents, for making a marginal entry of satisfaction where such means of satisfaction is used pursuant to §701.04, F.S. 1951, as distinguished from a written satisfaction which is filed for record (1941-1942 A.G.O., page 19). The basis for the fee is the language in §28.24, which permits a fee for "Writing any paper other than herein specifically mentioned, same as for copying, ...".

There is nothing in the language of §696.05, F.S. 1951, prohibiting the charging of or rendering inoperative the fee permitted by §28.24. The noting of satisfaction on the margin of the recorded instrument is no part of the recording process. Accordingly, the first question is answered in the affirmative.

AS TO QUESTION TWO

The language quoted in the second question from §696.05(2) F.S., 1951, to the effect that the charge for recording "... shall include the cost of the indexing of the record" of the instrument, clearly indicates a legislative intent that irrespective of the number of entries which may be required to properly index the instrument, there should be no fee for so indexing. The recording fee is an all inclusive charge and the statute so contemplates. See Clerk's Manual, page 324, to this effect. Hence, the second question is answered in the negative.

FORECLOSURE OF MORTGAGES

February 15, 1954.—054-28.

CLERKS CIRCUIT COURT—FORECLOSURE SALES —DISTRIBUTION OF PROCEEDS—COMPENSATION

QUESTIONS: 1. How should the funds received by a Clerk of the Circuit Court pursuant to foreclosure sale pursuant to §702.02, F.S., as amended by Ch. 28093, Acts of 1953, be handled and paid out by him?

2. What compensation is the clerk entitled to in connection with the holding of a foreclosure sale under said §702.02, and distributing the proceeds thereof?

3. Where should the said certificate of title be recorded?

4. Where no general index of all record books is kept where should the certificate of title issued by the clerk in connection with such foreclosure sales be indexed?

To: Honorable C. M. Gay, State Comptroller:

Prior to the adoption of Ch. 28093, Laws of Florida, Acts of 1953, it was the universal practice in courts of equity in this state, in connection with foreclosure sales, to appoint masters to make

the sales, receive the proceeds thereof and distribute the same, and issue deeds for and in behalf of the court. Under §702.02, F.S., as amended by Ch. 28093, Laws of Florida, Acts of 1953, it was provided that the clerk of the court wherein the foreclosure proceeding was pending should, under the direction of the court, sell the property for and in behalf of the court, issue certificates of the sale and of title, make distribution of the proceeds of sale and issue certificate of distribution and file the same in the cause. The statute as amended provides that "for his services in making such sale, the Clerk shall receive a fee of five dollars." In the clerk's certificate of sale, provided for in the said statute, we find the following recitation: "I have received my fee of five dollars for making the sale, same being paid by....."

It is provided in the statute that "the certificate of the clerk provided herein shall be by him recorded in the Chancery Order Book maintained by the Clerk, and shall be duly indexed in *the general index of the county* under the name of the purchaser named in such certificate." It is further provided in the said statute that "upon the filing of a Certificate of Title, the clerk shall disburse the proceeds of the sale in accordance with the provisions of the final decree of foreclosure, and shall thereupon file in the proceedings a report of such disbursements." It seems clear that the intention and purpose of the said amendment was to substitute the clerk of the circuit court for the master in chancery previously used by the courts in connection with foreclosure sales. The clerk is in the nature of a statutory master of the court for the purpose of making foreclosure sales. The proceeds from foreclosure sales held by masters have usually been received and distributed by them without such funds passing through the registry of the court.

On February 5, 1954, (054-26) this office held that the "\$5.00 fee allowed by Ch. 28093, Laws of Florida, 1953, is intended to be all inclusive so as to cover all duties required of the clerk under the terms of the act, and that the disposition of the proceeds from the sale is simply one step in connection with such duties." Under §62.07, F.S., masters in chancery evidently received no fees for handling moneys arising from foreclosure sales. "Public officers have no legal claim for official services rendered, except when and to the extent that compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous." (Rawls v. State, 98 Fla. 103, 122 So. 222).

In the light of the above and foregoing authorities and observations we are of the opinion:

1. That the funds received by a clerk of the circuit court as purchase money in connection with a foreclosure sale made by him as aforesaid are not court registry funds and should not be treated as such. The clerk receives and distributes them in the nature of a master in chancery.

2. "For his services in making such sale, the clerk shall receive a fee of five dollars." This seems to be the only fee received by him in this connection.

3. The certificate of title "should be by him duly re-

corded in the Chancery Order Book maintained by the clerk, and shall be duly indexed in the general index of the county under the name of the purchaser named in the certificate," where a general index is maintained in the county. Although it would be a convenience to the public, and especially to abstractors and those making title searches, for the certificate to be recorded in the Deed Book, we do not think that the statute so requires, neither does it prohibit such record if any interested party so desires, upon the payment of the proper recording fee.

4. Where no general indexes are kept but separate indexes are kept of each book or group of books, it would seem that the said certificate should be indexed as are other entries in the Chancery Order Book. Although not required by the statute, it would doubtless be a convenience for the certificate to be indexed in the general deed index, if one is kept.

CHAPTER XLI

ESTATES OF DECEDENTS

ADMINISTRATION UNNECESSARY IN CERTAIN ESTATES

October 13, 1954.—054-236.

COUNTY JUDGE—PETITION—ORDER OF ADMINISTRATION UNNECESSARY—FISHING CAMP OPERATOR— BOATS FOR RENT—LICENSES

QUESTIONS: 1. Does the petition for an order of no administration necessary, filed in compliance with Ch. 735, F.S., signed by all the heirs at law of decedent in which they agree that title to realty shall vest in one or more of said heirs, vest said title eo instante in said heirs upon the subsequent entry of such an order by the county judge based upon said petition?

2. Is the operator of a fishing camp on a river, whose boats are used in both fresh water and salt water, required to purchase licenses from both the game and fresh water fish commission and the director of conservation, where said fishing camp is located on waters which have not been established as either fresh water or salt water by the legislature or other authority authorized to do so?

To: *Honorable W. F. Anderson, County Judge, Levy County, Bronson, Florida:*

AS TO QUESTION ONE:

Section 735.05, F.S., provides, among other things, that a petition for an order of administration unnecessary shall set forth a statement of the agreed distribution of decedent's property, real and personal. Section 735.07, F.S., provides that in an order of administration unnecessary the county judge shall set forth the particular properties which shall be distributed to each heir. These provisions enable members of a family who are heirs of the decedent to make agreement and settlement among themselves as to the distribution of decedent's estate, and such procedure is looked upon with favor by the general law on this subject. 21 Am. Jur. 38, §21, 16 Am. Jur. 925, §§145-147.

A portion of §735.09, F.S., provides as follows:

"The county judge's order that administration of the estate of the decedent is unnecessary shall have the following effect:...

(3) *From and after the entry of such order, bona fide purchasers for value from those respectively to whom properties of the decedent may be assigned by the order shall take the same free, clear and discharged of all claims and demands of creditors of the decedent and all rights of the widow of the decedent and all other heirs, legatees, devisees and claimants against the estate.*" (Emphasis Supplied.)

This statute has the legal effect of vesting title *eo instante* in any assignee of properties of the decedent, as set forth in the order of no administration necessary. However, it is my opinion that until the order is actually entered by the court, the title is not vested as aforesaid.

AS TO QUESTION TWO:

Section 372.001(11), F.S., defines fresh water as follows:

"'Fresh water,' except where otherwise provided by law, includes all lakes, rivers, canals and other water ways of Florida, to such point or points where the fresh and salt waters *commingle to such an extent as to become unpalatable and unfit for human consumption because of the saline content*, or to such point or points as may be fixed by the commission of game and fresh water fish, by and with the consent of the board of county commissioners of the county or counties to be affected by such order. The Steinhatchee River shall be considered fresh water from its source to mouth." (Emphasis supplied.)

Section 372.001(12), F.S., defines salt water as including all bodies of water, streams, rivers, canals and water ways not defined as fresh water. Also, §370.01(5), F.S., defines salt water to the same effect.

Section 370.06, F.S., provides that "there shall be a license required by all boats, vessels, schooners and launches *equipped to take salt water products* from the tide or salt waters of the State of Florida. All such boats, vessels, schooners or launches before becoming active or operating must first procure a license from the director of conservation..." Section 372.63 F.S., provides that "Any person who engages in the business of renting boats for hunting in the waters of the state, or fishing in the fresh waters of the state, shall pay an annual license fee on each boat operated..." Said section further provides that "Application for such license shall be made to the game and fresh water fish commission upon application blanks furnished by him."

If the boats in question are *equipped* to take salt water products from the tide or salt waters of the state and are used for that purpose, the operator of said boats are required to procure license from the Director of Conservation. If the boats in question have only the normal features of a boat and are not specially equipped for taking salt water products in the salt waters of the state, it is my opinion that the operator of such boats is not required to procure a license from the Director of Conservation for their use in salt water. Whether or not a boat which is used in salt water is required to procure a license from the Director of Conservation is dependent upon its being *equipped* for taking salt water products in salt water.

If the same boats are rented for hunting on the waters of the state or for fishing in fresh waters of the state, the operator of said boats is required to pay an annual license fee on each boat operated to the Game and Fresh Water Fish Commission.

Your second question is answered accordingly.

CHAPTER XLII

DOMESTIC RELATIONS

HUSBAND AND WIFE

May 31, 1954.—054-129.

MARRIAGE CEREMONY—MUNICIPAL JUDGE—AUTHORITY

QUESTION: May a judge of a municipal court perform a marriage ceremony?

To: *Honorable William Brody, Municipal Judge, Miami Beach, Florida:*

Section 741.07, F.S., in part, provides:

"All regularly ordained ministers of the gospel or elders in communion with some church, *and all judicial officers* and notaries public of this state may solemnize the rights of matrimonial contract, under the regulations prescribed by law." (Emphasis supplied).

The precise point to be determined then is whether or not the judge of a municipal court is a judicial officer contemplated by the statute. One of my predecessors in office held that the performance of the marriage ceremony is a "judicial act" (A.G.O. 1931-32, page 567).

In *Farragut v. City of Tampa*, 156 Fla. 107, 22 So. 2d 645, the court was considering a search and seizure made under a warrant issued by the municipal judge. The case directly involved the validity of a special act permitting the municipal judge of the City of Tampa to issue search warrants. The court, at page 647, said:

"And Section 34 of Article V of the Constitution reads: 'The Legislature may establish in incorporated towns and cities, courts for the punishment of offenses against municipal ordinances.'

"In *McDaniel v. Harrell*, 81 Fla. 66, 87 So. 631, 13 A.L.R. 1333, it was held that the judges of the inferior courts, such as a municipal court, as well as judges of courts of superior or general jurisdiction, are exempt from civil liability in damages for their jurisdictional acts, even when such acts are in excess of their jurisdiction, provided there is not a clear absence of jurisdiction. This decision clearly recognizes that judges of municipal courts are judicial officers.

"Furthermore, Section 1, Article V of the Constitution provides that the judicial power of the State shall be vested in certain named courts, 'and such other Courts or

Commissions as the Legislature may from time to time ordain and establish.'

"So under our Constitution it is perfectly apparent that municipal courts are recognized as courts by our Constitution even though their jurisdiction is limited to cases involving the violation of a municipal ordinance."

The judge of the municipal court is then a judicial officer of a political subdivision of the state and therefore falls within the provisions of §741.07, F.S.

It follows that the question is answered in the affirmative.

BASTARDY

March 31, 1953.—053-72.

UNMARRIED WOMAN—BASTARD CHILD—SUIT TO ESTABLISH PATERNITY—SERVICE OF PROCESS

QUESTION: "Does F.S.A. Chapter 742 permit a suit to establish paternity to be brought by constructive service in accordance with F.S.A. 48?"

To: *Honorable James C Henderson, Assistant County Solicitor, Miami, Florida:*

Section 742.011 F.S. 1951, provides:

"Any unmarried woman who shall be pregnant or delivered of a bastard child, may bring proceedings in the circuit court, in chancery, to determine the paternity of such child."

Hence it is clear that this proceeding is clearly one in chancery.

Suits in chancery are governed by the Florida Equity Rules as promulgated by the Supreme Court of Florida. See §§25.47 and 48.16 F.S. 1951.

Rule 5(e) of the Florida Equity Rules provides:

"(e) Service of process by publication may be made in appropriate cases as provided by statute."

The Statutes dealing generally with constructive service are found in Ch. 48 F.S. 1951. In particular §48.01(10) provides that such service is available:

"(10) In any other suit or proceeding, not hereinabove expressly mentioned, wherein personal service of process or notice is not required by the statute or constitution of this state or by the constitution of the United States."

Personal service is not required in paternity cases by the statutes or constitution of this state or by the Constitution of the United States.

Although my answer to your question is, hence, in the affirma-

tive, I feel compelled to point out that the use of constructive service must always be considered in the light of its limited scope. Constructive service can only be effective where the action is in rem or quasi in rem and can affect only property rights within the State of Florida unless there is an appearance by the defendant. In other words, ordinarily, no personal judgment can be enforced where it is based on constructive service. It would seem that the various rules concerning constructive service in divorce cases are applicable to the proceedings under the instant act. It should be noted that these rules place a number of severe limitations on the effectiveness of constructive process to determine personal rights of nonresidents. For a brief but excellent summary of those rules, see 17 Am. Jur. 152.

CHAPTER XLIV

CRIMES

CHILD MOLESTER LAW

July 8, 1953.—053-144.

CRIMINAL COURT OF RECORD, ORANGE COUNTY— CONVICTION UNDER CHILD MOLESTER LAW— COMMITMENT TO STATE HOSPITAL

QUESTION: Does the Supreme Court's opinion in the case of Marsh, et al. v. Hobart Garwood, 65 So. 2d 15, render the Criminal Court of Record of Orange County powerless to commit a person convicted under the Child Molester Law to the State Hospital at Chattahoochee for treatment and rehabilitation?

To: Honorable George T. Kelly, Assistant County Solicitor, Orange County, Orlando, Florida:

I am of the firm opinion that your question should be answered in the negative. First, this aspect of the statute was never challenged or raised or considered by the Supreme Court or by the court below. Secondly, the only indication of such a result is the particular wording in Headnote 9 of the case as reported. The wording of Headnote 9 does indicate that the court cannot commit such a person to the State Hospital. However, this headnote is not the decision of the Supreme Court. It is not the language of the decision of the Supreme Court. It is simply a statement of what the editor felt Section 9 in this opinion holds. We feel the headnote misconstrues the opinion of the Supreme Court in this instance.

In the body of the opinion proper, under [9], the Supreme Court simply held that the portions of §2 of Ch. 26843, which purported to give the Parole Commission authority to parole, release or conditionally or absolutely discharge such a person, was inoperative. Further, in the second paragraph of the body of the opinion, the Court states that it has no doubt but that the legislature had authority to empower a trial judge to confine one in the State Hospital for psychiatric treatment. In the next paragraph of the body of the opinion, the Court discussed what authority the legislature had to extend any jurisdiction of the Parole Commission over such people. It concluded that the legislature had authority to delegate some sort of supervisory authority in the Commission; that the Commission should review the Hospital records of such persons; that such review was to be made with the view of assisting the trial judge, after the defendant had been delivered back to him, in further disposing of the case. The judge might then impose sentence and commit the defendant to prison or continue the stay of imposition of sentence and place the defendant upon probation. The Court then holds, "*Therefore, we do not disturb these aspects of the statute.*" (Emphasis supplied)

The Court simply held that in so far as the statute sought to authorize the Parole Commission to parole, discharge or release persons committed under this act, it was inoperative. The rest of the statute, including the power of the court to commit to the State Hospital, was left undisturbed.

I have no doubt but what the Criminal Court of Record of Orange County may commit such a person to the State Hospital, and that when that institution has exhausted its curative abilities upon that person and reports to the court that such is the case and that such person is not insane, the court should then take such person back for further disposition of the case, as is indicated under the circumstances.

March 9, 1953.—053-58.

CHILD MOLESTER LAW—VIOLATIONS—CONVICTION AND
SENTENCE—PAROLE OR PARDON—JURISDICTION
—CH. 801, F.S.

QUESTION: Where one has been convicted of a sex offense involving a minor child under the age of 12 years, said conviction having been secured after the Child Molester Law [Ch. 801, F.S.A.] went into effect, and one so convicted was sentenced to a term of years in the State Penitentiary, who, if anyone, has jurisdiction regarding the parole of such convicted prisoner?

To: *Honorable Julian C. Calhoun, Assistant State Attorney, Palatka, Florida:*

Section 801.03, F. S., provides as follows:

"(1) When any person has been convicted of an offense within the meaning of this chapter, it shall be within the power and discretion of the trial judge to:

"(a) Sentence said person to the sentence otherwise provided by law, or;

"(b) Commit such person for treatment and rehabilitation to the Florida state hospital, etc."

Section 800.04, F.S., is the sentence otherwise provided by law referred to in §801.03(1) (a), and provides as follows:

"Any person who shall handle, fondle or make an assault upon any male or female child under the age of fourteen years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without intent to commit rape where such child is female, shall be deemed guilty of a felony and punished by imprisonment in the state prison or county jail for not more than ten years."

Section 801.14(3), Florida Statutes, provides:

"(3) Any person who has been sentenced under §801.03(1) (2) of this chapter rather than committed under §801.03(1) (b) *shall not be paroled.*" (underscoring ours)

In your case it appears that George A Shamblen, Jr., was, on December 17, 1951, sentenced to 10 years in the State Prison upon a conviction involving intercourse with an 11-year old negress; and that on the same date, Norman Miller received an 8-year sentence in the State Prison on a conviction involving the same. It would therefore appear that these two cases come under the Child Molester Law, Ch. 801, F.S.

It is not the policy of this office to pass upon the constitutionality of statutes. Assuming the constitutionality of §801.14, Subsection (3), it is my opinion that the Parole Commission has no jurisdiction in these two cases. It will be noted that §801.14, Subsection (3), does not, in its specific terms, prohibit such a prisoner's being pardoned.

Article IV, §12, of the Constitution creates the Pardon Board consisting of "the Governor, Secretary of State, Comptroller, Attorney General and Commissioner of Agriculture, or a major part of them, of whom the Governor shall be one" and provides that such board

"...may, upon such conditions, and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment and grant pardon after conviction, in all cases except treason and impeachment subject to such regulations as may be prescribed by law relative to the manner of applying for pardons."

It is my opinion that in these two cases, one of three courses must be followed:

- (1) Miller and Shamblen will have to make a successful attack upon the constitutionality of §801.14, Subsection (3) [if the same is possible] and then apply to the Parole Commission for parole; or
- (2) Apply to the Pardon Board for a pardon; or
- (3) Serve out their sentences in due course.

LARCENY; RECEIVING STOLEN GOODS; RELATED CRIMES

March 13, 1953.—053-63.

LARCENY—GRAND AND PETIT—DEFINITIONS— PENALTIES—§§811.01, 811.02, F.S., REPEALED BY CH. 26912, F.S., 1951

QUESTION: "Does Chapter 26912, Laws of Florida, Acts of 1951, (Now §811.021, F.S.) alter, modify or repeal §811.01, dealing with grand larceny, and §811.02, dealing with petit larceny?

To: *Honorable William T. Harvey, Judge, Criminal Court of Record, Jacksonville, Florida:*

The title of Ch. 26912 reads, in part, as follows:

"An act to define Larceny; to Define and Describe Personal Property Which May be the Subject of Larceny; to Define, Prescribe, Establish and Describe the Method, Manner and Means Whereby and by Which a Person Shall be Deemed Guilty of Larceny..."

In the body of Ch. 26912, it defines larceny, provides that certain matters shall not be a defense, prescribes the contents of an indictment, information or warrant for larceny, preserves the right to grant a bill of particulars in proper cases, specifies the penalties to be imposed, provides that certain sections of the statutes (not including either §811.01 or 811.02) shall not be considered to be repealed by said Chapter, and expressly repeals all other laws which are inconsistent or in conflict with said Chapter.

When the title, contents, general scope and spirit of Ch. 26912 are considered, it appears to me that the legislature took care to frame a complete system for dealing with the larcenies denounced by §§811.01 and 811.02 and with certain larcenies previously dealt with by other larceny statutes, and also for dealing with other offenses against property rights which were made larcenies by Ch. 26912 but which, before its enactment, were punishable as embezzlement or as obtaining property by false pretenses. In my opinion, the Legislature intended Ch. 26912 to be a revision of and substitute for §811.01 and §811.02 and various other statutes.

In *Dees v. Smith*, 46 So. 173, the Supreme Court of Florida said:

"In *Jernigan v. Holden*, 34 Fla. 530, 16 South. 413, this court said: 'Where there is a revision by a later statute, the later being intended as a substitute for the former, there need be no express words of repeal; neither is it required that the latter statute shall be so repugnant to the former that both cannot stand and be construed together. The revision in itself operates as a repeal.' See also, *Prowell v. State*, 142 Ala. 80, 39 South. 164."

And in *American Bakeries Co. v. Haines City*, 180 So. 524, our Supreme Court said:

"As between two general acts, where a general statute covers the whole subject matter of an earlier act, and was evidently intended to be a revision of, or substitute for, the earlier act, although it contains no express words to that effect, it operates as a repeal of the earlier act to the extent that its provisions are revised and supplied, thus giving effect to the evident legislative intention, even though the later act contains no express repealing clause, *State v. Stoutamire*, 98 Fla. 486, 123 So. 834, and cases cited. And this may be true even where the later act covers a broader field than the earlier act. *Sparkman v. State*, 71 Fla. 210, 71 So. 34. See, also, *Jernigan v. Holden*, 34 Fla. 530, 16 So. 413; *Dees v. Smith*, 55 Fla. 652, 46 So. 173."

Applying the rules of law laid down in these cases to the situation confronting us, my conclusion is that Ch. 26912 repealed §§811.01 and 811.02, F.S.

ROBBERY

November 19, 1953.—053-314.

ROBBERY—CONVICTION—PENALTY—SENTENCE

QUESTIONS: 1. Chapter 28217, Laws of Florida, Acts of 1953, relating to robbery, provides that the penalty shall be imprisonment in the state prison for life or for any term of years not less than ten years at the discretion of the court. Does the trial judge have any authority to impose a sentence of imprisonment in the state prison for less than ten years for robbery?

2. If the answer to question one is in the negative, does the court have the authority to impose the minimum sentence of ten years and suspend a part of the ten years (for example, five years) and thereby reduce the sentence in that manner?

3. In the event that question one is answered in the negative, does the court have the authority to defer the sentence from day to day and term to term?

4. In the event that question one is answered in the negative, does the court have the authority to place the defendant on probation?

To: *Honorable William T. Harvey, Judge, Criminal Court of Record, Jacksonville, Florida:*

AS TO QUESTION ONE:

Inasmuch as Ch. 28217, Laws of Florida, Acts of 1953, requires that the person convicted of robbery be punished "by imprisonment in the state prison for life or for any term of years *not less than 10 years*, at the discretion of the court", the answer to Question One must be in the negative in so far as concerns robberies committed after the effective date of said statute. No sentence of less than the 10 years permitted by the statute is authorized. (See *Jones v. State*, 59 So. 892.)

AS TO QUESTION TWO:

A trial court has no power to suspend the execution of a sentence already lawfully imposed except for the purpose of giving effect to an appeal or where cumulative sentences are imposed and in some cases of necessity or emergency. (*Tanner v. Wiggins*, 45 So. 459). Therefore, I am of the opinion that the court does not have the power to impose a 10-year sentence for robbery and suspend a part of that sentence, thereby in effect reducing the sentence below the minimum of 10 years required by statute.

AS TO QUESTION THREE:

It is my opinion that when a person is convicted of robbery, the trial court has the power to defer the imposition of sentence

from day to day and term to term until the further order of the court. (See *Campbell v. State*, 179 So. 137; *Carnagio v. State*, 143 So. 162 and *Bronson v. State*, 3 So. 2d 873; also see *Moutos v. State*, 49 So. 2d 841). The power to suspend the imposition of sentence is inherent, as witness the statement in *Bronson v. State*, supra, that:

"There is nothing in the statutes to limit or restrain the court's *inherent power* to suspend pronouncement of sentence, once having entered a judgment of conviction...."

However, it is to be noted that in *Coleman v. State ex rel. Lynde*, 6 So. 2d 2, the Supreme Court of Florida said that it did not commend the exercise of the power to defer the imposition of sentence in cases like that one, thereby in effect throwing out a warning against a too liberal exercise of the power.

AS TO QUESTION FOUR:

A person convicted of robbery under Ch. 28217 may be sentenced to imprisonment in the state prison for life and \$948.01, F.S., withholds from the courts the power to place a defendant on probation if he has been convicted for "an offense punishable by death or life imprisonment". In *State v. Taylor*, 9 So. 2d 708, it was held that the trial court could not place on probation one convicted of second degree murder for which a term of life imprisonment might be imposed, even though a lesser term of incarceration was allowable. However, in the later case of *Parrish v. State*, 14 So. 2d 171, the Supreme Court announced that a majority of the justices were not convinced that the former holding in *State v. Taylor* was correct, and served notice that upon the same question being presented in another case it might be that the Court would overrule the *Taylor* case and hold that probation could be allowed unless the only penalty provided for by statute should be death or life imprisonment. It therefore appears that no authoritative answer can be given to your Question Four, but it is my personal opinion that the question should be answered in the negative.

TRESPASS AND INJURY TO REALTY AND SIMILAR OFFENSES

October 15, 1954.—054-239.

CRIMINAL TRESPASS—PARKING IN PRIVATE PARKING LOT—DEFINITION OF §821.18, F.S.

QUESTION: Where a private parking lot is properly posted as such, does a person who parks on said lot without the permission of the owner commit a criminal trespass?

To: Honorable K. C. Alvarez, Chief of Police, Ocala, Florida:

Your letter does not indicate that the parking lot in question is enclosed and I assume that it is in the City of Ocala and is not enclosed. Therefore, this opinion will not deal with trespass statutes affecting enclosed premises. Bearing this in mind, I find no applicable statute except §821.18, F.S., providing as follows:

"Other trespasses.—Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specially provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars."

It is a trespass to use the property of another without any authority or right whatsoever to do so. (Halifax Drainage District of Volusia County v. Gleaton, 188 So. 374). Parking on a posted private parking lot is a use of the parking lot and is therefore a trespass when done without the consent of the owner or his authorized agent and therefore without any right or authority whatsoever. Moreover the punishment for such a trespass "is not specially provided for".

The remaining question to be decided in determining whether said §821.18 applies to a person who parks in a posted private parking lot without the permission of the owner or his agent is as to whether such parking can be said to be done "with a malicious and mischievous intent".

"Malicious" means nothing more than that the wrongful act shall be done voluntarily, unlawfully, and without excuse or justification. (Williams v. State, 109 So. 805). A person who parks in a posted private parking lot without permission may be presumed to have done so voluntarily in the absence of a showing that it was done involuntarily. He acts unlawfully and in violation of the legal rights of the owner of the parking lot. I think that it would be possible for some extraordinary and unusual circumstances to exist which would afford such person an excuse, or perhaps even a justification, for so parking, but there would be no excuse or justification in any ordinary case. So, a person who parks in a posted private parking lot without permission ordinarily does so maliciously within the contemplation of the statute but the final determination of whether the parking is done maliciously would depend upon the peculiar facts of the case.

Does such a person act mischievously? One of the definitions of "mischievous" given in 58 C.J.S. 817 is "causing mischief" and on the same page "mischief" is defined as "Trouble or vexation caused by human agency or by some living being, intentionally or not." The same definitions of "mischief" and "mischievous" are found in Webster's New International Dictionary. A person who parks in a posted private parking lot without the consent of the owner or his agent causes trouble or vexation to the owner or his agent and commits a mischievous trespass if such parking comes to the attention of the owner or his agent. If neither the owner nor his agent finds out about it, no trouble or vexation is caused to either; what one is ignorant of doesn't trouble or vex him. So, whether the parking is done with a mischievous intent must be determined from the facts of the particular case.

MALICIOUS INJURY TO BUILDINGS AND STRUCTURES

June 14, 1954.—054-144.

CRIMES—INJURY TO SCHOOL BUS—PROSECUTION

QUESTION: What charge can be brought against a person who lets air out of the tires of a bus, thereby delaying the bus in meeting its schedule, where there was no damage to the tires or the tubes?

To: Honorable Frank A. Pavese, County Prosecutor, Lee County, Ft. Myers, Florida:

I think that a prosecution against such a person may be maintained under §822.18, F.S., which provides that "Whoever wilfully and maliciously destroys or injures the personal property of another, in any manner or by any means not particularly described in these Florida Statutes," shall be punished as provided in said Section.

Neither the bus nor any part thereof was destroyed. However, the bus was injured, the injury consisting of the impairment of its utility because of the deflation of its tires. When the air was let out of the school bus tires the bus was rendered useless for the purpose for which it was designed until the tires were inflated again. This impairment of the utility of the bus was an injury to the bus. This position is borne out by the cases cited in 38 C.J. 362 and 364, Malicious Mischief, §§7 and 10, and 54 C.J.S. 938, Malicious Mischief, §5. As an example of these cases, I quote from Footnote 8(d) in 38 C.J. 364, as follows:

"Where defendant plugged up the feed pipe of a steam engine and displaced other parts of the engine in such a way as rendered it temporarily useless and would have caused an explosion if the obstruction had not been discovered and with some labor removed, it was held that he was guilty of damaging the engine with intent to render it useless, within the meaning of the English statute, 24 & 25 Vict. c. 97 §15. *Reg. v. Fisher*, L.R. 1 C.C. 7.* * *

Section 822.18 requires that the injury be done "wilfully and maliciously". "Wilfully" simply means "intentionally"; "maliciously" means no more than that the wrongful act must be done voluntarily, unlawfully and without excuse or justification (*Williams v. State*, 109 So. 805). I apprehend that you will have no difficulty in establishing that the above discussed injury to the school bus was inflicted "wilfully and maliciously" within those definitions.

Section 822.18 makes one further requirement, that is, that the injury be committed in a manner or by means not particularly described in the Florida Statutes. I think that this requirement is met in your case because of the fact that I find no other Florida statute particularly, or otherwise, describing such an offense.

CRUELTY TO CHILDREN AND ANIMALS

December 10, 1953.—053-325.

COCK FIGHTING—ORANGE COUNTY—LEGALITY

QUESTION: The legality of cock fighting in Orange County where the game cocks are armed with miniature rapiers which inflict some injury, if not death, upon the participating roosters.

To: *Honorable Richard H. Cooper, County Solicitor, Orange County, Orlando, Florida:*

In my opinion, such cock fighting would violate §828.12, F.S., as construed in conjunction with §828.02, F.S. While there seems to be no Florida case directly in point, the Supreme Court of Florida, in the case of Mikell, et al. v. Henderson, Sheriff, 63 So. 2d 508, strongly indicates that cock fighting with artificial spurs would violate said sections.

As to your second question, concerning whether or not such practice could be enjoined by an action in equity as a nuisance, I am of the opinion that such fighting, unless it tended greatly to the corruption of public morals or created a situation wherein the public safety was involved, would not constitute a nuisance under our statute and, hence, could not be enjoined.

ISSUING WORTHLESS CHECKS AND DRAFTS

April 19, 1954.—054-91.

CRIMES—WORTHLESS CHECKS—INSUFFICIENT FUNDS—STOPPING PAYMENT—§832.01, F.S.

QUESTION: Where a person knowingly writes a check and issues the same and at the time has insufficient funds in the bank to cover such check, and thereby secures money, property or other thing of value therefor and later calls the bank and requests a stop payment on such check for the sole purpose of trying to take that check out of the terms of §832.01, F.S., does said transaction amount to an offense under said statute?

To: *Honorable Grady W. Tyner, Constable, Ft. Pierce, Florida:*

The gist of this offense is the making and uttering of a worthless check and securing money or property or other thing of value therefor while knowing at the time of said making and uttering he has not sufficient funds to meet and pay the same. Section 832.02, F.S., adds nothing to the definition of the offense under §832.01 but merely provides a means by which certain evidence may be produced sufficient to make a prima facie case. It is my opinion that a person writing a check as that above described, knowing at the time that he has not sufficient funds and who receives something of value for that check has committed that offense on the completion of the transaction, and whether or not he stops payment on the check has no bearing on his guilt or innocence.

Accordingly, your question is answered in the affirmative.

August 12, 1954.—054-199.

CRIMES—WORTHLESS CHECKS—PENALTY

QUESTION: Where a defendant is charged merely with the passing, uttering, and placing in circulation of a worthless check under the provision of §832.05, subsection 2, should a verdict of guilty be allowed to stand where the proof actually shows that he obtained something of value in exchange for the check?

To: Honorable A. T. Cooper, Jr., Assistant State Attorney, Clearwater, Florida:

Subsections 2 and 3 of §832.05, F.S., read as follows:

"(2) *Worthless checks.*—It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check.

"(3) *Obtaining property in return for worthless checks, etc.*—It shall be unlawful for any person, firm, or corporation to obtain any services, goods, wares, or other things of value by means of a check, draft, or other written order upon any bank, person, firm or corporation, knowing at the time of the making, drawing, uttering, issuing or delivering of said check or draft that the maker thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation, provided however, that no crime may be charged in respect to the giving of any such check or draft or other written order where the payee knows or has been expressly notified or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment thereof."

In my opinion the Legislature has set forth in these two Sections two separate substantive crimes. Subsection 2 makes it a substantive crime to draw, make, utter, issue or deliver a check under the circumstances condemned in that subsection. Subsection 3 makes it a crime to obtain property in return for the worthless check.

It seems to me that one could be charged, tried, convicted and sentenced for an offense under each of these subsections arising out of the same transaction.

This statute, I believe, is analogous to §§831.01 and 831.02, F.S., 1953, condemning forgery and the uttering of forged instruments. In the case of *Norwood v. Mayo*, in which the Supreme Court filed its opinion July 23, 1954, and in which a petition for rehearing is still pending, it was held that a person who forged an instrument and then uttered that instrument could properly be convicted of two separate crimes and could receive consecutive sentences. I am enclosing a copy of the State's brief in that case and I would call your attention to the argument under Question Two which, I believe, is pertinent to your question.

For the foregoing reasons it is my opinion that your question is properly answered in the affirmative.

August 4, 1953.—053-182.

WORTHLESS CHECKS—SALES TAX PAYMENT —UNLAWFUL

QUESTION: May a person be prosecuted under Ch. 28096, Laws of Florida, Acts of 1953, if he gives a worthless check in payment of the Florida Sales and/or Use Tax?

To: *Honorable C. M. Gay, State Comptroller:*

The purpose of Ch. 28096, Acts of 1953, is stated in subsection (1) of Section 1 thereof as follows:

“(1) PURPOSE.—The purpose of this act is to remedy the evil of giving checks, drafts, bills of exchange and other orders on a bank without first providing funds in or credit with the depository on which the same are made or drawn to pay and satisfy the same, which tends to create the circulation of worthless checks, drafts, bills of exchange and other orders on banks, bad banking, check kiting and a mischief to trade and commerce.”

In keeping with this announced purpose, subsection (2) of Section 1 of said act provides that:

“(2) WORTHLESS CHECKS.—It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check.”

Neither the above quoted statement of the purpose of the Legislature in enacting said law nor the above quoted provision

making it unlawful to give a worthless check specifies or contemplates that the check must be given for something of value. Consequently, it is my opinion that when a person gives a worthless check in payment of the Florida Sales and/or Use Tax, knowing at the time of giving such check that he does not have sufficient funds on deposit in or credit with the bank upon which it is drawn with which to pay the same on presentation, he is subject to prosecution under the above quoted subsection (2) of Section 1 of Ch. 28096 unless the transaction comes within the proviso at the end of said subsection.

BRIBERY

February 3, 1953.—053-22.

DEPUTY SHERIFF—BRIBE MONEY— FORFEITURES—PROCEDURE

QUESTION: A sum of money was paid to a deputy sheriff as a bribe for the purpose of procuring the deputy's permission for the payor to violate the criminal laws. The payor has been convicted for giving the bribe. The money has been delivered by the sheriff to the clerk of the circuit court, who now holds it. What is the procedure to be followed in order to have the money forfeited and paid into the proper county fund?

To: Honorable H. Gunter Stephenson, State Attorney, Winter Haven, Florida:

The law appears to be that there can be no forfeiture of money or property unless a statute authorizes such forfeiture. I quote from 37 C.J.S. 10, "Forfeitures", §5-a:

"To be incurred, forfeitures must be within the letter and spirit of the law. Since forfeitures are not favored, see supra §4b, they will not be given effect to, except by the express terms of a statute or by necessary implication flowing from some express provision of statute, and where the facts which purport to require such action come clearly and plainly within the provisions of the law." (Emphasis supplied).

I find no Florida statute which expressly or by necessary implication authorizes the forfeiture of money paid as a bribe.

Therefore, I do not think that the above mentioned bribe money is subject to forfeiture.

OFFENSES BY AUCTIONEERS, PUBLIC OFFICERS AND EMPLOYEES

July 20, 1953.—053-164.

EVERGLADES FIRE CONTROL DISTRICT—COMMISSIONERS —PURCHASE OF JEEP TRUCK FROM BOARD MEMBER—PROHIBITION

QUESTION: Can the Board of Commissioners of the Ever-

glades Fire Control District legally purchase, or pay for, a jeep truck when one of the commissioners is the owner of the company that submitted the lowest bid?

To: Mr. Guy J. Bender, Fire Chief, Everglades Fire Control District, Belle Glade, Florida:

Section 839.09, F. S. provides that "No state or county board or municipal board or council shall purchase supplies, goods or materials for public use from any firm or corporation in which any member of such board is either directly or indirectly interested, nor shall any such board pay for such supplies, goods or materials so purchased." Violation of this prohibition is made a misdemeanor, but any board member who was absent when the vote was taken to purchase such supplies and did not vote on the issue is not subject to prosecution under this section.

It is also provided in §839.091 that "(1) No person shall be subject to prosecution under Sections 839.08 and 839.09 when such purchases are: (a) made from the lowest bidder under sealed bids ... (2) the provisions of this section shall not apply to counties of the State of Florida with population of more than one hundred thousand."

Although it might appear upon cursory examination that subsection (1) (a) of §839.091 excepts from the penalty of §839.09 those state or county boards that purchase from a board member who, upon submission of bids, has submitted the lowest bid, it is evident upon further examination that subsection (2) of §839.091 should be taken into consideration. By excepting from the provisions of §839.091 those counties with populations of more than one hundred thousand, the Legislature has indicated that the exceptions contained in §839.091 are applicable only to county boards and officers in counties whose populations do not exceed one hundred thousand. The result of this implied legislative intention is that §§839.08, 839.09 are in full force and effect as to county boards and officers in the larger counties and as to all state boards and state officers.

Giving attention to the circumstances which prompted the enactment of §839.091, it is apparent that the Legislature intended to alleviate an undesirable condition existing in smaller counties because of the effect of §§839.08, 839.09. In those smaller counties the county officials had encountered considerable difficulty in obtaining necessary materials because so many of the local merchants from whom those materials could be purchased most economically were either members of the boards needing the materials or incumbents of county offices having some influence over the boards intending purchasing the materials. Such conditions are not as acute in larger counties and on the state level, and it is reasonable to assume on the basis of this consideration that the Legislature intended by §839.091 to relax the provisions of §§839.08, 839.09 only in counties having populations of less than one hundred thousand. State Boards such as the Board of Commissioners of the Everglades Fire Control District and county boards in the larger counties do not come within the meaning of §839.091.

In consideration of the foregoing, it is my opinion that the members of the Board of Commissioners of the Everglades Fire Control District would be subject to criminal prosecution for purchasing a jeep truck from a company owned by a board member and that the question set out herein should be answered in the negative.

OBSTRUCTING JUSTICE

October 7, 1954.—054-232.

BAIL BONDS—FORFEITURE—PENALTY

QUESTION: With reference to §843.15, F.S., would a bail jumper be subject to prosecution regardless of whether the bond forfeited is a cash bond or a bond signed by a surety, or sureties, for him?

To: *Honorable J. M. Hearn, County Judge, Live Oak, Florida:*

Section 843.15, F.S., provides as follows:

"It is unlawful for any person, who is charged by affidavit, information or indictment with the commission of any criminal offense within the State of Florida, and who has entered into and executed any bail bond, conditioned upon his appearance before any court in this state, to forfeit such bail bond by not appearing in the court at the time and place designated in the said bail bond."

"Any person, who shall violate this section shall, upon said bail bond being estreated by order of the court having jurisdiction over such bond, be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars."

It appears to be obvious that when a person who is charged by affidavit, information or indictment with the commission of a criminal offense executes a bond which is also executed by a surety, or sureties, to secure his appearance in court, he executes a "bail bond" within the contemplation of §843.15, F.S., and is subject to prosecution under said statute if he forfeits such bail bond by not appearing in court at the time and place designated in the bail bond.

As to cash bonds, §§903.16 and 903.17, F.S., provide for the posting of cash in lieu of sureties on an undertaking given to secure the defendant's appearance in court, and §903.26, F.S., provides for the forfeiture of bail undertakings and of money deposited as bail. I think that when a defendant posts his personal undertaking, secured by deposit of cash, as permitted by §903.16 or §903.17, he has executed a "bail bond" within the contemplation of §843.15 and that he is subject to prosecution if he forfeits such undertaking and cash deposit by not appearing in court as required by such undertaking.

To hold that §843.15 applies to an undertaking executed by

surety or sureties and at the same time to hold that such statute does not cover a personal undertaking secured by a deposit of cash would render the statute discriminatory and would probably deprive the person who executes a bond with surety or sureties of the equal protection of the laws and would in my opinion render it unconstitutional. Whenever possible, a statute should be construed so as to make it constitutionally operative, and for that reason, as well as for the reason that in my opinion the Legislature intended §843.15 to apply to all bail undertakings, whether secured by sureties or cash, I hold that §843.15 applies equally to both.

OBSTRUCTING JUSTICE

December 17, 1954.—054-261.

MUNICIPAL COURTS—BAIL BOND— ESTREATURE—PENALTY

QUESTION: Do the provisions of §843.15, F.S., apply to the estreature of an appearance bond in municipal court?

To: *Honorable Frank C. Stanley, City Attorney, City of Auburndale, Auburndale, Florida:*

Section 843.15, F.S., 1953, provides:

"Unlawful to Forfeit Bail Bond; Penalty.—It is unlawful for any person who is charged by affidavit, information or indictment with the commission of any criminal offense within the State of Florida, and who has entered into and executed any bail bond, conditioned upon his appearance before any court in this State, to forfeit such bail bond by not appearing in the court at the time and place designated in the said bail bond.

"Any person who shall violate this section shall upon said bail bond being estreated by order of the court having jurisdiction over such bond, be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars."

The statute provides that it is a misdemeanor to unlawfully forfeit a bail bond by one "who is charged by affidavit, information, or indictment with the commission of any *criminal offense* within the State of Florida."

It is well settled that a violation of a municipal ordinance is not a crime or a criminal offense against the State, but only against the municipal law. (See *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321).

"... Hence, the provisions for enforcing such ordinances and for prosecuting violations thereof need not conform to the provisions for prosecuting violations of the state law. In the strict meaning of the terms 'crime' 'criminal,' and other cognate terms, proceedings for the violation of purely municipal ordinances or regulations

are not crimes or criminal, but they resemble criminal cases in being penal proceedings." (62 C.J.S., §316A).

In *Rowe v. State*, 96 Fla. 723, 119 So. 118, the Court said:

"... our decisions recognize that there are essential differences between state laws and municipal ordinances. See, for instance, *Wallace v. State*, 41 Fla. 547, 584, 26 So. 713. This holding is in harmony with section 20 of article 3 of the Constitution, which says that the Legislature shall not pass any local law for the punishment of crime or misdemeanor. If offenses against municipal ordinances, which are purely local in their territorial operation and effect, should be held to constitute crimes, there would be no uniformity in the criminal laws of the state, and the intent of the constitutional provision would be defeated. But as offenses against municipal ordinances providing penalties for certain acts in violation thereof are neither crimes nor misdemeanors, strictly speaking, within the meaning of the constitutional provision, or of Section 2706, Rev. Gen. Stats., convictions for the same are not admissible as affecting the credibility of witnesses."

Therefore, it is apparent that the question must be answered in the negative.

GAMBLING

October 20, 1953.—053-280.

LOTTERY LAW VIOLATIONS—PINBALL MACHINES —MINORS—FREE GAMES

QUESTIONS: 1. "Is it a violation of the law for the proprietor of a pinball machine to allow a minor to play the machine? In this question we are assuming that the particular machine is not a gambling device, but is played only for the pleasure of the player (and perhaps the onlookers)."

2. "If a pinball machine, by reason of the player attaining a high enough score, gives the player another game on the machine (without the insertion of another coin) is it then a gambling machine or device being operated in violation of law?"

To: *Hon. Sam Godbold, Constable, Wellborn, Florida:*

Answering your second question first: A coin operated pinball machine of the conventional type which dispenses to the player a free game if he makes a high enough score is very much a gambling device and its operation is a violation of the law. (See *Sinclair v. Benton*, 10 So. 2d 917; *Weathers v. Williams*, 182 So. 764; and *Eccles v. Stone*, 183 So. 628).

As to your first question: If the pinball machine is coin operated and dispenses free plays or other form of prize or reward, then it is a violation of law for the proprietor to permit a minor or anyone else to play the machine. Even if the pinball machine does not dispense free plays or any other form of prize or reward,

yet it is unlawful to permit minors or anyone else to gamble on it. I do not think it unlawful to permit minors to play a pinball machine for amusement only if it dispenses no free games or other form of prize or reward.

December 6, 1954.—054-258.

LOTTERY LAWS—PUNCHBOARDS—VIOLATIONS

QUESTION: Is a punchboard, consisting of covered holes which may be punched to reveal a number where the player pays a certain amount depending upon which number he has punched and where a prize is awarded to the holder of a pre-determined lucky number, a violation of the gambling laws of the State of Florida?

To: *Honorable James H. Tucker, Sheriff, Volusia County, DeLand, Florida:*

This type punchboard has been designated as a lottery by numerous authorities. See: 54 C.J.S. 858, Lotteries, §10; State v. Hudson, 37 S.E. 2d 553; Helen Ardelle, Inc. v. Federal Trade Commission, (CCA 9th) 101 F. 2d 718. Like other types of punchboards which have been held to be lotteries, this one is operated in the following manner. The board contains a number of holes covered by paper wafers, on each of which is printed a name. When punched, each hole emits a tiny slip of paper which contains a number as well as a name. The participant pays anywhere from 1¢ to 39¢, depending upon the number printed upon the piece of paper which he has punched from one of the holes on the board. There is a pre-determined lucky name printed under a seal on the board. After all of the holes have been punched and all of the names sold to participants, this seal is broken by the operator of the gaming device. Then, the person who has purchased the name which corresponds to the name under the seal on the board wins a doll.

All of the elements of a lottery are present in this type of punchboard. The three elements necessary are consideration, a prize and an award by chance. 54 C.J.S. 845, Lottery, §2; Little River Theatre Corporation v. State ex rel. Hodge, 135 Fla. 854, 185 So. 855. The requisite consideration exists here in the payment of from 1¢ to 39¢, depending upon the number punched. The prize, of course, is the doll. Pure chance or luck determines whether or not the participant punches the name on the board which corresponds to the name under the seal. Inasmuch as this type of punchboard is a lottery, it is then unlawful under §849.09, F.S., making it unlawful for any person in this state to set up, promote or conduct any lottery for money or for any thing of value.

This punchboard is, of course, a gambling device and as such would also be unlawful to operate under §849.11, F.S.

The answer to your question, therefore, is in the affirmative.

September 9, 1954.—054-213.

LOTTERY PROHIBITED—"PLAY RADIO" SCHEME—
SPONSORING MERCHANTS—VIOLATIONS

—§849.09, F.S.

QUESTIONS: 1. Does a radio broadcasting "give away" show called "play radio" constitute an illegal lottery, under the following facts and circumstances:

Those desiring to participate in the opportunity to win one of the offered prizes obtain entry blanks, free of any charge, from any one of many sponsors (grocery stores, drug stores, filling stations, etc.) or one may prepare his own "reasonable facsimile." The entry blank consists of two duplicate forms; on this duplicate form, the participant fills in a series of numbers, selected arbitrarily by himself, in blank spaces provided for that purpose. He retains one copy, putting his name and address on the duplicate and sending it to the radio station. Thereafter, at the scheduled time the radio announcer picks and calls out numbers at random over the air, and when a participant who is listening to the program finds a row of some five numbers on his card identical to those so announced on the program, he telephones the radio station to report his success. The station then checks the duplicate form to verify the accuracy of the winner, and if found to be correct the lucky person receives a prize. The advertising matter contains the following statements:

"Sponsors should be furnished with ample supply of forms, similar to one shown on page three of this brochure.

"We don't recommend forcing prospective players into the sponsors' stores. They should be allowed to use the published blanks (and as the instructions indicate) should be permitted to make up facsimiles for other members of the family.

"In practice, though, most people don't make up facsimiles and go instead to the sponsor to get additional forms for the rest of the family.

"The listener then mails his duplicate to your station. It might be pointed out that if station and sponsor so desire, they could call for a new distribution each month... using a different color paper, and indicating each month's playing form as being good only that month.

"This would mean, of course, that a new set of duplicates and playing forms would be valid only that current month.

* * *

"If you have a number of sponsors, each sponsor will have his own segment of the program and will get his commercial before and after each game"?

2. Would a radio "give-away" show constitute an illegal lottery under the same facts and circumstances described in question one, if, in addition, the person telephoning the radio station, after filling

in the required numbers on his card, is required to answer correctly a question or questions before being declared the winner of the prize?

3. Would a radio "give-away" show constitute an illegal lottery, under substantially the same facts and circumstances outlined in question one, except that the entry blanks could be obtained only from the radio station, or from the daily newspaper, and were not distributed through sponsoring stores?

To: Honorable John A. Madigan, Jr., Attorney, Florida Sheriffs Ass'n, Tallahassee:

AS TO QUESTION ONE:

It is clear that the elements of prize and award by chance are present. The only other matter to be considered is as to whether the third element essential to a lottery, viz., consideration, is present.

In *Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855, the Supreme Court, in holding that a theatre "Bank Night" scheme was a lottery even though it was possible for a person to win the prize without buying a theatre ticket or attending the theatre, said:

"Bank Night advertizes the theatre, increases the attendance, and the receipts show a material enhancement. When we visualize substance rather than form, the theatre management desired to fill the theatre by the Bank Night method. It is clear that the management of the theatre was not interested in filling the lobby outside of the theatre, or the vacant lots within a radius of two or three blocks, but the sole objective was to increase the attendance upon the theatre by the advertisement of Bank Night and as an incident the revenue of the theatre was increased. We therefore hold that the Bank Night method as disclosed by the admitted statement of facts is a lottery prohibited by the statutes, supra."

In addition to the benefits reaped by the radio station from the "Play Radio" scheme, it appears that there is ample consideration flowing to the sponsoring merchants.

Participants must expend time and make the effort to go to the place of business of a sponsoring merchant to obtain entry blanks. It is true that it is possible for a participant to draw up his own playing form, but, as is stated in the advertising matter, "In practice, though most people don't make up facsimiles and go instead to the sponsor to get... forms..." Most people are not going to go to the trouble to make up a facsimile form and so the overall practical effect of the scheme is to require that most entrants obtain them either directly or indirectly at the places of business of the sponsors. And, as to the persons who do make up their own facsimiles, it is apparent that they must make them up from forms procured by other persons who have furnished a consideration by expending the time and effort necessary to go to the places of business of sponsors to obtain them. The time and effort of such persons, together with the benefits that con-

comitantly flow to the businesses of the sponsors as a result of such persons going to these places of business for the forms, constitutes a consideration for the chance to win a prize.

Having people go to the sponsors' places of business is for the benefit of the sponsors, because it builds up their businesses and increases their sales. All, or substantially all, prospective participants are subjected to the sales appeal of the merchandise offered for sale at the places of business of the sponsors. When a person appears at such a place of business to secure an entry blank and become a participant in the hope of receiving a free prize, that person is made aware of the various commodities offered for sale there and he frequently makes a purchase, then or later, as the result of going there for an entry blank. The reason the merchants sponsor the scheme is to make these sales and the profit which accrues therefrom. It is clear that the merchants who sponsor "Play Radio" do so for the purpose of achieving a financial profit out of the scheme, not for the purpose of becoming public benefactors. This benefit to the sponsors furnishes a consideration for the chance to win a prize.

Another item of consideration accruing to the sponsors arises from the fact that participants must put their names and addresses upon the duplicate entry blanks mailed to the radio station, with the result that the sponsors are thereby furnished a ready mailing list of prospective customers.

And, as was said by the Supreme Court of Oklahoma in *Knox Industries Corp. v. State ex rel. Scanland*, 258 P. 2d 910, in holding that a give away scheme was a lottery where all that was necessary to qualify to win a prize was to go into any Knox service station or store and obtain a ticket, leaving the stub in a container, and where the expressed purpose of the enterprise was the creation of good will and the opportunity for advertisement of the Knox corporation's products:

"Admittedly defendants are not conducting a philanthropic endeavor. The expressed purpose of this enterprise is the creation of good will and the opportunity for advertisement of defendants' products and merchandise. The resultant benefits from the public good will must be recognized. The value of the advertising can neither be doubted nor minimized, since the general acceptability of defendants' products is made known thereby."

It is my opinion that the element of consideration is amply present and that the "Play Radio" scheme is a lottery, conducted by the sponsoring merchants with the aid of the radio station, and I call your attention to the fact that everybody who aids or assists in conducting a lottery violates the lottery statute (§849.09, F.S.).

AS TO QUESTION TWO

This question relates to whether the essential element of chance would be eliminated if the person who fills in the required numbers on his card and telephones the radio station is required to answer correctly a question or questions before being declared the winner of the prize.

The answer to the question depends upon the type of questions asked such participant. If the questions are such that the answers are obvious, or if the radio station employee who receives the call gives hints which point to or reveal the correct answers, or if the contestant can easily guess the correct answers, then the essential element of chance is present because, when substance rather than form is considered, the determination of the winner depends upon the chance of whether the radio announcer calls out numbers corresponding to those which the participant has written on his card, rather than upon any element of skill or judgment. In such a situation the scheme would be a lottery. The same result would obtain if the questions should be so technical or otherwise difficult that they are beyond the capacity of the general public to answer and are answerable only by an expert, because in such a situation the average member of the public could arrive at correct answers only by guessing them.

On the other hand, if the questions which are asked require skill or judgment in order to correctly answer them, and are not beyond the capacity of the general public to answer, then the element of chance would not predominate because the determination of the winner would not depend upon the chance of whether the numbers called out by the radio announcer corresponded with those theretofore placed by the participant upon his card or upon guesswork. In such a situation the scheme would not be a lottery.

The foregoing answer to Question Two is in line with my opinion 049-519, rendered to Honorable V. R. Fisher, County Solicitor, Tampa, Florida, under date of November 1, 1949.

AS TO QUESTION THREE:

This question relates to whether the essential element of consideration would be present if the entry blanks could be obtained only from the radio station or from the daily newspapers instead of being distributed by the sponsoring stores.

I think that in such case a valuable consideration moves directly from the participants. This consideration consists of the fact that the cards which are turned in by the participants make up a convenient mailing list without cost to the radio station, a direct promoter of the scheme, which mailing list is of definite value and which probably, though not necessarily, would also be furnished to and redound to the benefit of the sponsoring merchants. A further consideration consists of the fact that participants render services by advertising the scheme at large, which advertising benefits not only the radio station but the sponsoring merchants as well. Therefore, I think that your Question Three is properly answered in the affirmative. (See *State v. Lynch* (Okla.), 137 P. 2d 949; *Maughs v. Porter* (Va.), 161 S.E. 242).

May 31, 1954.—054-130.

LOTTERY LAW VIOLATIONS—INFORMATION—
PROSECUTIONS—BEVERAGE SUPERVISORS—
EVIDENCE—SEARCH AND SEIZURES
—LEGALITY

QUESTIONS: 1. In prosecutions under F.S. §849.09, as amended, relating to lotteries, is it necessary for the state to prove that the alleged lottery was conducted within two years prior to the filing of the information?

2. In prosecutions arising out of beverage law violations, where it appears from the evidence that supervisors of the State Beverage Department approach a dwelling house, identify themselves to the wife of the defendant who resides there, and request permission to search said house, may such wife grant permission so as to bind her husband, who is absent from the premises, so that evidence seized on the premises may be introduced against said husband in the trial of the case?

To: Honorable Paul B. Johnson, County Solicitor, Tampa 2, Florida:

AS TO QUESTION NO. 1:

Section 932.05, F.S., requires that all offenses not punishable with death (with exceptions not material here) shall be prosecuted within two years after the same shall have been committed. It follows that in a prosecution for any of the acts made unlawful §849.09, F.S., dealing with lotteries, the state must prove that the act was committed within two years prior to the institution of the prosecution.

To illustrate, a prosecution under §849.09(1)(a) is for the act of setting up, promoting or conducting a lottery for money or for something of value, and in such a prosecution it is, of course, necessary that the state prove that a lottery was actually set up, promoted or conducted for money or other thing of value within two years before the institution of the prosecution; failing to do this, the state has not proved that the act charged was committed within two years before the prosecution.

On the other hand, a prosecution under §849.09(1)(g) is for the act of selling, offering for sale, or transmitting a lottery ticket, coupon or share, or share in or fractional part thereof, whether such ticket, coupon or share represents an interest in a live lottery not yet played or whether it represents or has represented an interest in a lottery that has already been played; and all that is necessary for the state to prove with regard to time is that the act charged, i.e., the sale, offering for sale or transmission, occurred within two years prior to the institution of the prosecution; it is completely immaterial whether the lottery has ever been played at all or whether it was played before or during the two years immediately prior to the institution of the prosecution.

Along the same line, a prosecution under §849.09-(1)(h) is for the act of having in one's possession a lottery ticket or any evidence of any share or right in a lottery ticket or in any lottery

scheme or device, whether such ticket or evidence of share or right represents an interest in a live lottery not yet played or whether it represents or has represented an interest in a lottery that has already been played; and all that is necessary for the state to prove with regard to time is that the defendant committed the act charged, viz., having possession of a lottery ticket or evidence of a share or right in a lottery ticket or in a lottery scheme or device, within two years before the prosecution was started; it makes no difference whatsoever whether the lottery has ever been played at all or whether it was played before or during the two years next preceding the institution of the prosecution.

In short, it is only necessary to prove that the act for which the prosecution is had was committed within two years before the institution of the prosecution. If such act can be proved without proving that a lottery was conducted within two years prior to the institution of the prosecution, then it is not necessary to prove that a lottery was conducted within two years prior to the institution of the prosecution. By applying this rule to the several clauses of §849.09 which have not been specifically mentioned hereinabove, you will have no difficulty in determining whether proof of a violation thereof requires proof that a lottery was conducted within two years before the institution of the prosecution.

AS TO QUESTION TWO:

This question is answered in the negative upon the authority of *Carlton v. State*, 149 So. 767 and *Rivers v. State*, 59 So. 2d 740. This answer is given upon the assumption that the dwelling house in question was not a licensed place of business under the beverage law, if it were, §562.03, F.S., would come into play and require a different answer.

February 15, 1954.—054-35.

LOTTERY LAW VIOLATIONS—STORE PURCHASES— “LUCKY DAY”—REFUND FOR RECEIPTS

STATEMENT: “Commencing on the first day of January, 1954, and each day thereafter, a store will give a dated receipt for each purchase. The customers will be urged to save these receipts. At the end of each month, the store will pick a day in the preceding month for which it will give a refund in full for all receipts returned to the store for that day.”

To: *Honorable W. M. Smiley, State Attorney, Bradenton, Florida:*

In my opinion, the scheme outlined clearly constitutes a lottery. The essence of a lottery is that it contain (1) a prize, (2) a chance, and (3) a consideration. The prize in this situation, of course, is the return of the purchase money. The consideration is the money that was expended in the first instance to make the purchase. The chance is that taken by the purchaser in speculating that any particular day will be the date chosen by the store as the “lucky day.”

September 4, 1953.—053-232.

LOTTERY LAW VIOLATIONS—THEATRE TICKETS
—GRAND PRIZE AWARD

QUESTION: On Friday only, a theatre gives numbered tickets to its patrons at the time they are admitted to the theatre. The ticket stubs are placed in a metal barrel. About 8 P.M. on Friday, a representative of the theatre draws from the barrel 8 stubs. The numbers on these 8 stubs are called out and the patrons holding the tickets bearing corresponding numbers go upon the stage. The theatre representative has 8 cards numbered from 1 to 8. Each contestant draws one of these cards and the contestant who gets the card numbered 1 is asked a question of skill, usually pertaining to motion pictures. If contestant No. 1 answers the question correctly, he has the right to pick any one of 10 cups which are turned upside down on the table, and he receives whatever is under the cup selected by him. Under one cup is the grand prize, ranging from \$5 to \$200. Under each other cup is a prize ranging from \$1 to articles of merchandise such as hosiery and theatre tickets. If the No. 1 contestant does not pick the cup under which the grand prize is hidden, then the grand prize is withdrawn from the table and held over until the following week, when another \$5 is added to it for the next Friday's program. The contestants other than No. 1 pick cups according to the numerical order of their cards and receive the prizes under the cups selected by them.

Do these facts show a violation of the lottery laws or of any other gambling law?

To: *Honorable John J. Twomey, Assistant City Attorney, Tampa, Florida:*

The three elements in a lottery are prize, consideration and award by chance.

It is apparent that the facts outlined above show a prize and a consideration. This leaves for determination whether the award is by chance.

I think that the award to each of the eight contestants is by chance.

The element of chance essential to a lottery is present if chance determines the amount or value of the return to a participant. Also, a scheme is none the less a lottery because it promises a prize to each ticket holder, if the prizes to be drawn are of different values. (See 54 C.J.S. 846, Lotteries, Section 2-b 1).

As to contestant No. 1, although he has to answer a question in order to qualify to be the first one to select a cup, and although after correctly answering the question he is certain to receive a prize of some value, the determination of the value of his prize depends solely upon chance.

The whole scheme is a matter of pure chance as to the other seven contestants. They are selected by chance. They do not have to answer any question in order to be eligible to select a cup

(although it would not make the plan any the less a lottery if they did have to answer questions). The order in which they select cups is determined by chance. What each receives, and the value thereof, when he chooses a cup depends upon chance.

Therefore, I think that the scheme is a lottery.

April 29, 1953.—053-86.

COMMUNITY CENTER—BINGO GAME—PRIZES—
VOLUNTARY CONTRIBUTIONS—LOTTERY
LAW VIOLATIONS—ART. III, 23, FLA.
CONSTITUTION.

QUESTION: A community center, along with various other recreational activities, offers to the public a bingo game. No charge is made for the bingo cards. The winning participants are provided with modest prizes consisting of groceries. Soft drinks and refreshments are sold during the course of the evening. At the conclusion of an evening's activities voluntary contributions may be made by anyone using *any* of the facilities of the community center?

To: *Honorable A. Max Brewer, County Prosecuting Attorney, Titusville, Florida:*

It is well established that there are three basic elements in a lottery, namely: (1) a prize, (2) an award by chance, and (3) a consideration.

It is clear that this situation involves a prize.

It is clear that bingo is a game of chance. See *Creash v. State*, 179 So. 149 and my opinion, No. 050-439, 1949-1950 Biennial Report of the Attorney General.

I believe that a consideration, also, is clearly present. I base this conclusion primarily upon the decision of the Florida Supreme Court in the case of *Little River Theatre Corporation v. State ex rel Hodge*, 185 So. 855, in which the court held that a bank night was a lottery even though it was not necessary to pay *anything* to participate and that consideration was present because the plan increased the attendance and materially increased the receipts.

In the instant situation, it is readily apparent that the offering of prizes to the winners at bingo has the effect of making bingo a popular pastime. It is clear that the more persons attracted by this game of chance, the greater will be the receipts both from voluntary contributors as well as from the sale of soft drinks and refreshments to the participants.

It is true that this plan is not one for private gain but for community projects. The Constitution, however, bars all types of lotteries. See Article III, Section 23, Florida Constitution.

For these reasons, it is my opinion that the proposed plan would be illegal.

March 9, 1953.—053-59.

AMERICAN LEGION, STATE CONVENTION—ENTERTAINMENT—FREE CHANCE ON AUTOMOBILE—LOTTERY
LAW VIOLATION

STATEMENT: PROPOSAL: It is proposed by the American Legion at its State Convention in Orlando to hold a function at the Tangerine Bowl in Orlando, consisting of:

- (a) Drum and Bugle Corps contests,
- (b) Honor Guard competition; and
- (c) A special memorial service.

To this function, each member of the American Legion and Auxiliary who registers for said Convention will be given a free pass to the Tangerine Bowl for Saturday night. The public will be invited to attend and an admission charge will be made of \$1 for adults and 50¢ for children. It is further proposed that in order to stimulate attendance at the Saturday night function, to give away an automobile in the following manner: Each person entering the Tangerine Bowl on the aforesaid Saturday night will be given a "free chance", said chances to be pooled together and one drawn therefrom, the holder of the chance drawn being declared to be the winner of said automobile.

To: *Honorable Dave Starr, Sheriff, Orange County, Orlando, Florida:*

There are three elements in a lottery, to-wit: (1) a prize; (2) an award by chance; and (3) a consideration. It is clear that this plan involves a prize, to-wit: an automobile, and the award by chance, to-wit: the drawing of one free chance from the many pooled together.

It appears from the factual situation which you submitted that the objective sought by the giving away of this car is to stimulate the attendance, on the part of the public, for which attendance a charge of \$1 for adults and 50¢ for children will be made. It is my opinion that this furnishes a consideration for the free chances given because the free chances are given as an inducement to get the people attending to part with their money for the admission price. A scheme in which a merchant sells goods for their fair market value but by way of inducement gives each person a chance to win a prize is a lottery (54 C.J.S. 850-851, "Lotteries", Section 4; 34 Am. Jur. 654, "Lotteries", Section 10). And a scheme in which, in order to facilitate the selling of bonds, the purchasers thereof are given chances to win prizes is also a lottery (54 C.J.S. 857, "Lotteries", Section 10-b; 34 Am. Jur. 658, "Lotteries", Section 15). In each of these schemes, the payment of money for merchandise or bonds also furnishes a consideration for the chance to win a prize by chance.

By analogy, instead of a proposal to sell merchandise or bonds, your problem presents a proposal to sell entertainment. By the same token, in the plan outlined by you, the payment of money for the entertainment also furnishes a consideration for the chance to win the prize by chance.

In addition to the above, the element of consideration may be present, within the contemplation of the lottery statute, without any direct payment for the right to participate. It was so held in the *Little River Theatre Corporation v. State ex rel Hodge*, 185 So. 855. In that case, the Supreme Court held that Theatre Bank Night was a lottery even though it was not necessary for a person to buy a theatre ticket or pay anything for the right to participate in the drawing. The Court held that the element of consideration, which must be present to constitute a lottery, was present because the scheme advertised the theatre, increased the attendance, and materially enhanced the receipts.

It is apparent that the scheme outlined by you is designed to accomplish these very objectives, to-wit: advertise the function to be put on said Saturday night, increase the attendance thereof, and to materially enhance the receipts therefrom.

Because of the foregoing, it is my opinion that the said plan would constitute a lottery and would, therefore, be illegal.

February 27, 1953.—053-46.

LOTTERY VIOLATIONS—BUSINESS SCHEME—PYRAMID
CHAIN—CARDS—COUPON SALES—PENALTIES

—\$849.091, F.S.

BUSINESS SCHEME: A brief analysis of the way this scheme operates in practical effect is as follows:

1. Mrs. Fitzpatrick proposes to issue cards which call for \$10 in merchandise to be honored by certain stores. Attached to each of these cards are four coupons. Each coupon sells for \$1.00 each.

2. A person designated as "A" purchases one of these coupons which entitles him to secure a card from Mrs. Fitzpatrick upon the payment to her of an additional \$3. "A" then sells the four coupons on his card to persons designated as "B", "C", "D" and "E".

3. When "B", "C", "D" and "E" have taken their coupons to Mrs. Fitzpatrick and, for an additional \$3 each, have purchased a card apiece from her, Mrs. Fitzpatrick then validates the card of "A" and "A" receives \$10 in merchandise at one of the designated stores.

4. "B", "C", "D" and "E" go through the same process or transaction that "A" went through and upon the completion thereof, their cards are validated by Mrs. Fitzpatrick.

To: Honorable M. J. Daffin, Sheriff, Bay County, Panama City, Florida:

It will be observed that when "A" has completed his transaction, he shall have invested a total of \$4 in his coupon and card; however, he shall have recovered the whole \$4 through the sale of the four coupons attached to his card, so that his \$10 in merchandise is free.

For the purposes of this opinion, we shall designate "A's" transaction as Transaction 1, that of "B", "C", "D" and "E", we shall call Transaction 2. It will be observed that at the end of Transaction 1, cards are in the hands of 4 people and at the end of Transaction 2, cards are in the hands of 16 people. At the end of Transaction 3, cards would be in the hands of 64 people and so on until the 8th transaction requires a mathematical total of 55,536 people participating and paying \$4 each or all the cards then outstanding will not be validated by Mrs. Fitzpatrick and, consequently, some of the cardholders will be stuck for from \$1 to \$4 each. It is interesting to note that the transaction designated as the 9th transaction requires a total of 222,144 people participating and paying \$4 each.

From the above brief outline of the said scheme, it is apparent that this is a chain or pyramid chain reaction and, in my opinion, is one of those schemes expressly denounced and declared a lottery by §849.091, F.S. Annotated, which provides as follows:

"§849.091 CHAIN LETTERS, PYRAMID CLUBS, ETC., DECLARED A LOTTERY; PROHIBITED; PENALTIES.—The organization of any chain letter club, pyramid club, or other group organized or brought together under any plan or device whereby fees or dues or anything of material value to be paid or given by members thereof are to be paid or given to any other member thereof, which plan or device includes any provision for the increase in such membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive fees, dues or things of material value from other members, is hereby declared to be a lottery, and whoever shall participate in any such lottery by becoming a member of, or affiliating with, any such group or organization shall be guilty of a felony, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five thousand dollars, or by imprisonment in the county jail for a period of not more than two years or in the state penitentiary not less than one year nor more than ten years."

This is manifestly just such a scheme as the legislature intended to denounce and prohibit in this statute.

Furthermore, §823.01, F.S., provides as follows:

"All nuisances which tend to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, shall be indictable and punishable by a fine not exceeding two hundred dollars, at the discretion of the court.

"Any nuisance which tends to the immediate annoyance of the citizens in general or is manifestly injurious to the public health and safety, or tends greatly to corrupt the manners and morals of the public, may be removed and suppressed by order of the justice of the peace court of the district..." (underscoring ours)

In this scheme, it is obvious that in the final analysis, a breakdown in the chain reaction must finally result and when it does so, people holding the coupons and cards are going to be stuck by some \$1 to \$4. This is so because the population simply cannot absorb such a scheme. Manifestly, therefore, it would appear that the participants are in effect in a mad scramble to get something for nothing, to wit: \$10 free merchandise, and shove their coupons off into the hands of someone else who must ultimately be stuck.

In my opinion, this sort of scheme and the results thereof constitute an annoyance to the community and it tends to corrupt the public morals and manners of the people in that it encourages them to attempt to secure something for nothing, the ultimate success of which depends upon sticking some other member of the public.

It is therefore my opinion that this scheme, in addition to being a violation of §849.091, F.S., is also a violation of §823.01 F.S., as a nuisance and is, consequently, illegal.

August 18, 1954.—054-204.

LOTTERY LAW VIOLATIONS—APPRECIATION DAY PLAN

QUESTION: The legality of a so-called "Appreciation Day" plan?

To: *Honorable A. L. Redmon, Chief of Police, Palmetto, Florida:*

The scheme according to the literature which you forwarded is substantially as follows:

"Attached to this folder, you will find a TREASURE CHEST COUPON. You may secure others upon request at any time from any of the APPRECIATION DAY merchants or at the office of the sponsor. Coupons will be offered to all present at the weekly APPRECIATION DAY program. They are free.

In additional coupon will be offered to you every time you make a purchase from one of the participating firms. In these instances, the percentage punched on the coupon will bear a direct relation to the amount of the total transaction, in order that community surveys may be conducted from time to time to determine the size of the average unit purchases, the expansion of the trade territory, etc.

With purchase of \$	0.25 to \$	0.99 you get	5% Coupon
With purchase of	1.00 to	4.99 you get	10% Coupon
With purchase of	5.00 to	9.99 you get	20% Coupon
With purchase of	10.00 to	14.99 you get	30% Coupon
With purchase of	15.00 to	24.99 you get	40% Coupon
With purchase of	25.00 to	49.99 you get	50% Coupon
(Limit Two coupons on any one purchase)			

Don't let the merchant forget to give you a coupon with every purchase. It is to his advantage and that of the community that your coupons be included in the

community surveys. And please do not ask him to violate the above schedule in any particular. If he did so, he would defeat the purpose of the program and be expelled from participation by the other merchants.

REMEMBER that compliance with this schedule not only makes possible accurate surveys by the sponsor, but it causes the Treasure Chest to grow so that your respective coupons become more valuable from week to week. *A 50% coupon can sooner or later be worth twice as much as a 50% coupon is worth at the beginning. So use all your APPRECIATION DAY coupons, large and small; watch their value grow from week to week.*

ALL YOU DO is write your name and address on the back of each coupon and drop it in the box of some participating firm. All coupons are collected each APPRECIATION DAY and deposited in the community container. At the weekly APPRECIATION DAY program, the name of one person will be selected from the container by the same method used in selecting the members of a jury.

‘ONLY ONE NAME WILL BE DRAWN.’ IF THIS PERSON IS NOT PRESENT, HE, OR SHE WILL BE NOTIFIED AND AS A TOKEN OF APPRECIATION WILL BE AWARDED SOME NOMINAL AMOUNT.

THE REMAINING FUND will then be carried to the following APPRECIATION DAY and to it will be added the next week's Treasure Chest subscription. Tell your neighbors about APPRECIATION DAY coupons and where they are obtainable.

FOLLOW THESE RULES

1. Study the names on the back of this folder.
2. Secure coupons from the participating firms or sponsor.
3. For those given with purchases *see that percentage conforms with amount of the transaction.*
4. If punched on the line, the smaller percentage will govern.
5. Write your own name—merchant is not allowed.
6. You can drop your coupon in the box of the merchant taking part in the plan, or at the stand on the day of the program.
7. If your name cannot be read, coupon is void.
8. Crumpled or defaced coupons are void.
9. If coupon is punched more than once it is void.
10. Clerks cannot win in store where employed.
11. Merchants and their families can never win.
12. Nobody can answer for another except Husband or Wife.
13. Coupons are not destroyed each week. The more coupons you have the greater your chance."

* * * * *

"19. NO CONSIDERATION OF VALUE must ever be accepted in exchange for a coupon. A coupon should be given upon request to anyone who might ask for it without even making a purchase. At each program, a small jar of unpunched coupons should be placed upon the stand and the following announcement should be made: Anyone who does not have coupon in the container is invited to take one from this jar, sign his name on the back, and deposit it here and now. This gives non-patrons an interest in your program at the very beginning. The mails should not be used in publicizing the event."

* * * * *

"4. Under no circumstances give out coupons on any other basis than that specified in the Announcement Circular, the Rules and Regulations and the Supply Meeting form. *The success of the Plan depends on this! Remember two 50% coupons is the maximum to be issued to any person on a single transaction. Provision is made to expell any merchant violating the rules for handling coupons. (Rule No. 2).*"

Let me say that it is my firm opinion that the operation outlined above is clearly a lottery and is illegal. It is clear that this scheme embodies the three component elements of a lottery. It cannot be doubted that there is a prize distributed by chance. It is just as clear that a consideration is present.

The scheme clearly indicates that the so-called free tickets which are distributed other than as a result of a purchase at a store of one of the participating merchants will be merely a 5% coupon. This apparently means that if a 5% coupon is drawn the person whose name is on that coupon wins 5% of the pot if he is present at the drawing. A person who makes a purchase at one of the participating firms may receive a coupon which will return to him a greater portion of the pot up to a total of 50% of the pot and the determining factor as to the value of his coupon is the amount of the purchase that he has made. Hence, it is clear that he is paying for the enhanced chance each time he makes a purchase. Although, it is true that certain of the participants may enter the scheme without the expenditure of any money and be eligible for a prize of 5% of the pot, still consideration is present in that certain of the participants are paying for their opportunity to participate and particularly the opportunity to win a greater prize. See *Little River Theatre Corp. v. State*, ex rel Hodge, 185 So. 855.

It may seem that my opinion holding this scheme to be a lottery is inconsistent with my view expressed on December 12, 1952, in opinion enumerated 052-325 and found in the Biennial Report 1951-52 at page 750, and a copy of which opinion I am herewith enclosing. However, a perusal of that opinion will make it clear that the facts presented at that time did not show that persons would receive more valuable coupons as a result of their greater purchases.

It is my view that National Trades Day Association of Texas

has misrepresented to the merchants of your city that I have approved their plan when in fact it has been changed since the time that it was presented to me originally.

DRUNKENNESS; VAGRANCY; DESERTION

April 14, 1953.—053-84.

ILLEGITIMATE CHILDREN—FATHER—NONSUPPORT —PUNISHMENT

QUESTION: Can §856.04 F.S., 1951, providing "any man who shall in this state desert his wife and children, or either of them ... or who shall withhold from them or either of them the means of support... shall be punished by imprisonment in the State Prison not exceeding one year or by a fine not exceeding \$1,000.00 ..." be invoked against the father of an illegitimate child from whom he has withheld support?

To: *Honorable A. R. Cooper, Jr., Assistant State Attorney, Clearwater, Florida:*

I am compelled to answer this question in the negative for the following reason:

Although the Florida Supreme Court has never ruled on the question, all of the courts of this country which have determined the point have, without exception, held that statutes, such as this one, which punish for non-support of children and which make no specific reference to illegitimate children, apply only to non-support of legitimate children. See cases compiled in 30 A.L.R. 1075 and the supplemental annotations thereto and also 10 C.J.S. 94.

VIOLATION OF CERTAIN COMMERCIAL RESTRICTIONS

April 19, 1954.—054-94.

STATE PLANT BOARD—SALE OF ORCHIDS

QUESTION: Is it unlawful for anyone in the State of Florida to possess the plants described in §865.061(1), F.S.?

To: *State Plant Board, University of Florida:*

Subparagraph 1 of §865.061, which was §1 of Ch. 26882, Laws of 1951, prohibits the buying, selling, offering or exposing for sale, of the following:

"Bromelia (Bromel)—all epiphytic species (Native to the State of Florida),
Tillandsia—(except Spanish moss) (Native to the State of Florida),
Catopsis—Gusmania (Native to the State of Florida),
Orchids—both epiphytic and terrestrial species (Native to the State of Florida)."

The statute does not prohibit the possession or the growing of orchids.

Enclosed herewith are copies of two earlier opinions on this subject, Nos. 053-135 and 053-237.

September 11, 1953.—053-237.

SEE: OPINION NO. 053-135
STATE PLANT BOARD—CERTAIN FLOWERS AND
PLANTS—SALES PROHIBITED

QUESTIONS: Whether §865.061, F.S., applies to plants imported from other states or countries, and whether the plants described in subsection 1 of the statute may be sold if propagated by the seller on his own land, or if obtained under a contract with other Florida land owners to grow them?

To: State Plant Board, Florida State University:

Subsection 1 of the statute absolutely prohibits the buying or selling, or offering for sale of:

“Bromelia (Bromel)—all epiphytic species (Native to the State of Florida); Tillandsia—(except Spanish moss) (Native to the State of Florida); Catopsis—Guzmania (Native to the State of Florida); Orchids—both epiphytic and terrestrial species (Native to the State of Florida).”

Each of the four plants mentioned in subsection 1 of the statute refers exclusively to such plants which are “Native to the State of Florida”. The phrase “Native to the State of Florida” means indigenous to the State of Florida, that is, such species as were growing in the State of Florida when the first white settlers arrived, and were at the time “growing wild” in the State of Florida.

I have considered whether subsection 1 of the Act would apply to plants of the species described therein which were imported from another state or country. The language seems to permit no conclusion except that it prohibits the buying, selling, offering, or exposing for sale, of the plants named therein, native to the State of Florida, regardless of by whom, or when, or where, they were raised.

It will be observed that subsection 2 of the Act lists a much larger number of plants which are less rare than the four listed in subsection 1, but even those may not be purchased, sold, exposed or offered for sale, except under the two circumstances set up in subsection 2, that is:

“... unless such person shall have in writing a statement showing that such trees, shrubs, or plants, or portions thereof, were raised or produced by a licensed nurseryman; or by the owner or lessee of land, who grows thereon such trees, shrubs, plants or portions thereof, ...”

I am of the opinion that the prohibition as to the plants described in subsection 1 of the Act is absolute, and that there are no exceptions; that subsection 2 of the Act permits the buying,

selling or offering for sale of the plants described in subsection 2 only and exclusively under the two circumstances and conditions quoted above. The 1953 amendment to subsection 2 does not affect the questions presented.

June 25, 1953.—053-135.

STATE PLANT BOARD—CERTAIN FLOWERS AND
SHRUBS—SALES PROHIBITED

QUESTION: Is there any legal way in which native Florida Bromelia, Tillandsia, Catopsis, and orchids can be gathered and sold in the State of Florida?

To: *State Plant Board, Florida State University:*

Section 1 of Ch. 26882 of the Laws of 1951 makes it a misdemeanor for any person within the State of Florida to knowingly buy, sell, offer or expose for sale any of the following trees, shrubs, plants or any portions thereof:

“Bromelia (Bromel)—all epiphytic species (native to the State of Florida),
Tillandsia—(except Spanish moss) (Native to the State of Florida),
Catopsis—Guzmania (Native to the State of Florida),
Orchids—both epiphytic and terrestrial species (Native to the State of Florida),”

This question is answered in the negative.

CHAPTER XLV

CRIMINAL PROCEDURE

ARRESTS

August 20, 1953.—053-208.

ARRESTS—CONSTABLE'S PRISONER—SHERIFFS— RELEASE WITHOUT BAIL TO ATTORNEY—UNLAWFUL

QUESTIONS: 1. Does the sheriff have the lawful right to release a "justice of the peace and constable prisoner without bond in care of an attorney"?

2. "Who handles constables' prisoners until bound to a higher court"?

To: *Honorable E. P. DeFriest, Justice of the Peace, Ft. Pierce, Florida:*

I assume that your Question One refers to prisoners arrested by the constable and placed in the county jail (1) to await a hearing before the justice of the peace or (2) because of failure to make the bonds required of them by the justice upon binding them over to a higher court.

In my opinion No. 053-170, a copy of which is enclosed herewith, I ruled that when a court has set bail the sheriff has no authority to release the defendant in the custody of his lawyer, without the posting of the bail set by the court. That ruling applies to every case where a justice of the peace has set bail for a defendant in a case brought before said justice, regardless of whether the bail is set before a hearing is had or whether it is set upon the binding over of defendant to a higher court.

Likewise, if bail has not been set for a defendant who has been arrested and placed in the county jail by a constable, the sheriff is without authority to release the defendant in care of an attorney.

AS TO QUESTION TWO:

By "handling", I assume that you mean taking the prisoner from the jail to court for a hearing and, if the prisoner be committed or recommitted to jail, taking him back to jail.

When the constable arrests a law violator without a warrant, it is the constable's duty to take him before a magistrate and make a complaint. (§901.23, F.S.). He is the constable's prisoner and the fact that he may have been lodged in the county jail for safekeeping until this duty can be performed does not relieve the constable of the duty nor give the sheriff any right to perform it.

If, while a prisoner is lodged in the jail after a constable has sworn out a warrant for him before a justice of the peace, the

justice should require the prisoner to be brought before him for a hearing, it is optional with the justice whether to direct the constable or the sheriff to perform this service, because each is qualified to serve as executive officer of the Justice of the Peace Court. (See §37.16, F.S.).

If a defendant in a case made by the constable is committed or recommitted to jail by the justice of the peace, the justice may issue the commitment papers to either the constable or the sheriff. The sheriff or constable whichever it may be, to whom the commitment is issued, is charged with the duty of handling the prisoner in execution of the same.

June 10, 1954.—054-140.

SHERIFFS—ARRESTS—ENTRY INTO DWELLING WITHOUT WARRANT—AUTHORITY—§901.15(1), F.S.

QUESTION: Will you please advise me whether or not a Sheriff or Deputy Sheriff has made a lawful entry into a dwelling if he arrests persons inside that dwelling without Warrant and without Search Warrant if he does so under the following conditions:

1. Information has been received by officers from a passer-by that drunkenness and fighting are going on in the front yard of this dwelling place.

2. Officers drive to this place, park their car in front on State Highway and observe that the reported disturbance in the yard has ceased, but from the parked car see through lighted windows and hear from within sounds and actions which would indicate that the two persons so reported were in a drunken condition inside.

3. Officers alight from their automobile, go inside the yard and onto the porch and see and hear through the windows further evidence that the two persons are drunk.

4. They knock upon the door, are recognized as officers, are admitted by a Juvenile member of the family.

5. When within the house officers are convinced that the two persons are in a drunk and intoxicated condition and arrest both.

Have the officers entered and effected a legal arrest, having done so without either an Arrest Warrant or Search Warrant?

To: Honorable George Watts, Jr., Sheriff, Washington County, Chipley, Florida:

I believe that from the statements contained in your question that it can well be concluded that a misdemeanor, to-wit: a violation of §856.01, F.S., 1953, was being committed in the presence of the officers at the time they parked their car in front of the dwelling of the persons arrested.

Hence under §901.15(1) F.S., 1953, the officers had clear authority to make the arrest without a warrant. Having such authority the officers were justified to use reasonable means neces-

sary to make the arrest. The means used by the officers described in your question certainly cannot be said to be unreasonable.

Therefore, my answer to your question is that the officers entered and effected a legal arrest.

August 6, 1953.—053-190.

OPINION NO. 052-268—QUESTIONS 4 & 5 RESCINDED
MUNICIPAL POLICE OFFICERS—PICK-UP NOTICES—
ARRESTS—SERVICE OF PROCESS

QUESTION 4: As to pick-up notices received from other peace officers in Florida.

To: *Honorable Virgil Stuart, Secretary, Peace Officers Association, Assistant Chief of Police, St. Augustine, Florida:*

The statute involved here is §901.15, F.S., which provides as follows:

“A peace officer may without warrant arrest a person :

“(1) When the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence. In the case of such arrest for a misdemeanor or violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit.

“(2) When a felony has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it.

“(3) When he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.

“(4) When a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution.”

Under the provisions of Subsection (4) above, a municipal police officer may arrest a person when a warrant has been issued for the arrest of such person charged with any criminal offense, whether a felony or misdemeanor, and placed in the hands of any peace officer for execution. This means the warrant must have been issued and placed in the hands of an executive officer for execution, either a Florida or federal officer authorized to execute the warrant.

Subsection (3) of §901.15, F.S., authorizes a municipal officer (since he is a peace officer) to arrest a person when he has reasonable ground to believe that a felony has been committed and has reasonable ground to believe that the person to be arrested has committed it. When a municipal police officer receives a pick-up notice from another peace officer showing that a named person is wanted by the officer sending out the pick-up notice for a crime which is a felony (in Florida this would be a crime punishable by death or imprisonment in the State Penitentiary), then I think

that the municipal police officer receiving the notice has reasonable ground to believe that a felony has been committed and reasonable ground to believe that the wanted person committed it, and has authority to arrest the wanted person.

AS TO PICK-UP NOTICES RECEIVED FROM OTHER STATES

Section 941.14, F.S., authorizes any peace officer or private citizen to arrest without a warrant upon reasonable information that the accused stands *charged* in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. This statute is the only authority for a municipal police officer to arrest a person for a crime committed in another state against the laws of that state, (except that such officer, acting purely as a private citizen under the common law and not through any authority given him by means of his office, may arrest for a felony committed in another state).

To justify an arrest under §941.14, *supra*, upon the basis of a pick-up notice, without further information, it is necessary that the pick-up notice show that the person to be arrested (1) actually stands charged in a court of another state, and (2) with an offense punishable in that state with death or imprisonment for a term exceeding one year. If either of these facts do not appear from the pick-up notice, a municipal officer is not justified in making the arrest unless he procures from other sources the knowledge that said facts exist.

AS TO PICK-UP NOTICES RECEIVED FROM FEDERAL OFFICERS

In the case of *March v. United States*, 29 f (2d) 172, the court of appeals affirmed the conviction of the defendant and upheld an arrest of the defendant by a New York State Trooper for committing a federal misdemeanor in the officer's presence. However, the court assumed that the trooper stopped the car for the violation of a local ordinance, and either saw or was told of the federal crime. The court turned the legality of the arrest on state law and upheld it since the New York Code of Criminal Procedure provided that "a peace officer may, without a warrant, arrest a person... for a crime committed or attempted in his presence, "the court taking the position that this provision of the state statute gave authority for arresting for federal crimes, regardless of whether they were felonies or misdemeanors.

A municipal police officer is a peace officer (4 Am. Jur. 17-18, Arrest, Section 24; *Osborne v. State*, 87 Fla. 418, 100 So. 365) and he has the common law right of a private citizen to arrest for a felony, whether federal or state.

Acting purely as a private citizen, under the common law rule, which is applicable in Florida, a municipal police officer may arrest (a) where a felony has *actually been* committed (probable cause to believe that a felony has been committed, not being sufficient), and (b) the police officer as such citizen has reasonable ground to

believe that the person arrested committed it. (4 Am. Jur. 25 Arrest, Section 37; C.J.S. 606-607, Arrest, Section 8-b-2.)

A municipal police officer being a peace officer is however not restricted nor limited to the powers of a private citizen in matters of arrest.

The Supreme Court of the United States in *United States v. Di Re*, 332, U.S. 581, 68 S. Ct. 222, 91 L ed 210, held that in the absence of an applicable federal statute the law of the state where the arrest without a warrant takes place governs its validity. See also *Brubaker v. United States*, 183 F. 2d 894.

Judge Learned Hand in *United States v. Coplon*, 185 F. 2d 629, explains the law of arrest thusly:

"In the absence of some controlling federal law the validity of an arrest for a federal crime depends upon whether an arrest for a state crime would have been valid under the state law, if made in the same circumstances. Whatever the doubts which might have existed as to this before 1948, they were laid in that year. At common law a private person, as distinct from a peace officer had the power to arrest without warrant for a felony, committed in his presence, and for one, actually committed in the past, if he had reasonable ground to suppose that it had been committed by the person whom he arrested. A 'constable' or other 'conservator of the peace' had all the powers of arrest without warrant of a private person, and in addition the power to arrest for felony, although no felony had actually been committed, if he had reasonable ground to suppose that the person arrested had committed the felony. That was the only distinction between their powers and those of a private person."

See also the case of *Cline v. United States*, 9 F. 2d 621, where Cline was arrested and searched and officers removed from his person narcotics and certain marked money. He was charged with violating federal narcotic laws on three counts and the question was the admissibility of the morphine and money in evidence. If it was a legal arrest the evidence was admissible as obtained incident to a legal arrest. The court pointed out that the offense with which the defendant is charged is a felony. Also, under the provisions of the penal code of Arizona, an officer is entitled to arrest without a warrant a person who has committed a felony, though not in the officer's presence. The court then made this statement: "The procedure for making arrest which obtains under the state practice is applicable to arrest made for crimes against the United States". (See also *United States v. Horton*, 86 F. Supp. 92, S.D. Mich. 1949)

Our Supreme Court of Florida in *Duggar v. State*, (Fla.), 43 So. 2d 860, held that a juror who participated in a verdict of guilty in a murder case was not disqualified as such juror although he had been convicted of a federal felony, notwithstanding that §40.01, Subsection (2), F.S., provides:

"No person, who shall have been convicted of bribery, forgery, perjury or larceny, or any other felony, unless restored to civil rights, shall be qualified to serve as a juror."

The court pointed out that §25 of Art. XVI of the Florida Constitution provides: "The term felony, whenever it may occur in this constitution or in the laws of the state, shall be construed to mean any criminal offense punishable with death or imprisonment in the State Penitentiary," (emphasis supplied) and the court took the position that the word felony was limited to the definition given by the constitution unless legislative language in the statutes shows an intention to give the term felony a broader or different meaning.

It is my opinion that in matters of law enforcement in apprehending criminals for having committed crimes our statutes must be given a more liberal construction, and therefore, it is my view that a municipal police officer may arrest without a warrant based on a federal pick-up notice (1) when a federal felony has been committed and he has reasonable ground to believe that the person to be arrested has committed it, (2) when he has reasonable ground to believe that a federal felony has been or is being committed and reasonable ground to believe that the person to be arrested committed it or is committing it, and (3) when a federal warrant has been issued charging any federal criminal offense and has been placed in the hands of any peace officer for execution. (This would normally be a federal office having jurisdiction to execute said warrant.)

AS TO QUESTION FIVE

If a municipal police officer arrests a person without authority of law, and actually restrains or detains the arrested person by actual force or reasonably apprehended force, though actual force is not necessary, such policeman is guilty of the common law offense of false imprisonment (See 35 C.J.S. 622-623, "False Imprisonment," Section 71), which offense, in my opinion, is punishable in Florida under §775.01 and §775.02, F. S. I think that in such case, the policeman is also liable to suit for false imprisonment.

The rule is well settled that a municipal corporation is not liable for false imprisonment committed by its policemen (Brown v. Town of Eustis, 110 So. 873; Kennedy v. City of Daytona Beach, 182 So. 228; Swanson v. City of Fort Lauderdale, 21 So. 2d 217), unless liability is imposed by the city charter or other statute. I know of no general statute imposing such liability. If a special law setting up a city charter, or otherwise dealing with the city, imposes such liability, then, of course, the city is bound by it if it is a valid law.

June 8, 1954.—054-135.

MUNICIPAL POLICE OFFICERS—STATE LAWS —ENFORCEMENT—AUTHORITY—§901.15, F.S.

QUESTION: "Where neither the city charter of a city nor any city ordinance of a city specifically authorizes municipal police

officers to enforce state laws do the police officers of the city have the authority to enforce state laws and hence have the protection from liability resulting from such authority?

To: Honorable K. C. Alvarez, Chief of Police, Ocala, Florida:

The answer to this question is in the affirmative. Section 901.15, F.S., 1953, provides the circumstances under which a peace officer may arrest without a warrant. The Supreme Court of Florida in at least two cases has held that a police officer of a municipality is a peace officer under that section of the law. See *Cortes v. State*, 185 So. 323 and *Haynes v. State*, 72 So. 180. The latter case provides that it is the duty of the city police officer to enforce state law.

Volume IV of American Jurisprudence at page 17 states:

"Although policemen were unknown to the common law, they are generally considered as being the legal equivalent of watchmen and as having, in making arrests for crimes or offenses against the state, the common law authority of watchmen, sheriffs, constables, and other like officers; where public officials are expressly authorized by statute or ordinance to conserve the peace, they have, in making arrests, all the common-law authority of constables and watchmen. In general, it may be said that a peace officer is a person designated by public authority to keep the peace and arrest persons guilty or suspected of crime."

October 27, 1953.—053-292.

STATE COURTS—SHERIFFS AND CONSTABLES—
ARREST WARRANTS—EXECUTION—MUNICIPAL
POLICE OFFICERS—POWERS—§901.04, F.S.

QUESTIONS: 1. Is it lawful for a Justice of the Peace to place in the hands of city police officers arrest warrants which are directed to sheriffs and constables where the basis for such warrants are upon the affidavit of a police officer or upon the affidavit of a citizen brought before a Justice of the Peace by a police officer?

2. If a prisoner or his attorney demands to see the arrest warrant, directed to sheriffs and constables, upon which the prisoner has been arrested by a city police officer, is it lawful for the city police officer to read the arrest warrant to the prisoner before said prisoner has been turned over to the sheriff?

3. Is it lawful for a police officer in one city to send a fugitive warrant to a police officer of another city for the purpose of making the arrest of a fugitive, without first going through the sheriff's office?

To: Honorable George S. Fosler, Justice of the Peace, Sarasota County, Sarasota, Florida:

Although, under authority of §§901.01 and 901.02, F.S., it is lawful and proper for a Justice of the Peace to issue arrest war-

rants directed to sheriffs and constables upon the affidavit of a city police officer or upon the affidavit of a citizen brought before the Justice of the Peace by a city police officer, we know of no law which authorizes the Justice of the Peace to place arrest warrants directed to sheriffs and constables in the hands of a city police officer. The law controlling the direction of arrest warrants issued by Justices of the Peace, as stated in §901.04, F.S., is as follows:

"901.04 DIRECTION AND EXECUTION OF WARRANT.—The warrant shall be directed to all and singular the sheriffs and constables of the State of Florida. It shall be executed only by a sheriff or constable of the county in which the arrest is made, unless the arrest is made in hot pursuit, in which event it may be executed by any sheriff or constable who is advised of the existence of said warrant. An arrest may be made on any day and at any time of the day or night."

On the question of "what authority, if any, does a municipal police officer have to arrest the defendant when he receives an arrest warrant for such defendant from a sheriff or constable of another county in Florida, charging either a felony or misdemeanor, and is directed by such sheriffs or constables to pick up the defendant and hold him for delivery", it was stated in my opinion dated September 4, 1952, No. 052-268, amended as to some questions by Opinion No. 053-190, as follows:

"A municipal police officer has no authority to execute any arrest warrant issued by a state court. The power to execute such warrants is vested solely in sheriffs and constables (Section 901.04, Florida Statutes)."

In the matter of arrests on fugitive warrants, §941.13, F.S., provides as follows:

"Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, and except in cases arising under §941.06 with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under §941.06, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to *any peace officer* commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any

other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant." (Emphasis supplied)

Police officers are *peace officers*. The warrant is directed to *any* peace officer. There are no provisions in the above quoted statute which could distinguish a sheriff from any other peace officer. It matters not by which channel the warrant comes into the hands of the peace officer.

Therefore, it is our opinion that:

Question No. 1 should be answered in the negative.

Question No. 2 is answered in Question No. 1.

Question No. 3 should be answered in the affirmative.

Enclosed you will please find copies of the above referred to opinions, which also answer other questions which are related to the questions now before us.

August 12, 1954.—054-198—054-140.

**MUNICIPAL POLICE OFFICERS—POWERS OF ARREST—
FEDERAL EMPLOYEE FOR SPEEDING—SEARCH
AND SEIZURES LEGAL**

QUESTIONS: 1. May a police officer arrest the driver of a United States mail truck for speeding?

2. Where a police officer, by looking through a window of a private residence, sees a felony being committed, may he make a lawful arrest and a lawful search and seizure incident to that arrest?

To: Patrolman Francis J. McCoy, Orlando Police Department, Orlando, Florida:

The law on the first question is fairly well settled and the general rule laid down by the courts, federal as well as state, is that provisions of state or municipal law, fixing speed limits, must be obeyed by an employee of the United States while engaged in transporting United States mail in a truck owned by the government. The only requisite necessary, in order that the local laws be enforceable against such an employee, is that the state or municipal law should not conflict with a directive of the Postmaster General requiring a higher speed limit for the mail-carrying vehicles in order to meet necessary schedules. In *Johnson v. Maryland*, 254 U.S. 51 (1920), the leading case on the subject, the court held that the State of Maryland could not require the federal employees driving mail trucks in Maryland to be licensed by the state. However, the court went on to say, "Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. . . . It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as for instance,

a statute or ordinance regulating the mode of turning at the corners of streets." (Id. at page 56)

From the foregoing, the answer to question one is in the affirmative, so long as the speed restrictions are not unreasonable or in conflict with federal directives.

Under §901.15, F.S., a lawful arrest may be made by an officer of a person who has committed a felony in his presence. In order to make this arrest an officer may enter any building in which the supposed felon is committing his act, as per §901.19, F.S. While so making this arrest, the officer is permitted by §901.21, F.S., to search the person, and "... anything found on such person or in his possession which tends to show the guilt of such person of the violation of law shall be admitted in evidence upon a trial in which such violation is charged..."

In *Italiano v. State*, 193 So. 48, 49, 50 (Fla. 1940), the court said:

"The rule appears established in this State that search and seizure is not unreasonable if accomplished without a warrant but as an incident to lawful arrest. *State ex rel. Stillman v. Merritt*, 86 Fla. 164, 99 So. 230, 235. It was there pointed out that where the law authorizes arrest without warrant a reasonable search and seizure may be made incident thereto and appropriate 'to the reasonable requirements for making effective a lawful arrest'."

See also, *Rodriguez v. State*, 58 So. 2d 164 (Fla. 1952) and *Haile v. Gardner*, 82 Fla. 355, 91 So. 376 (1921).

From time immemorial officers making lawful arrests have seized from the alleged criminal, either from his person or from his premises, the instruments or articles which may tend to prove the crime.

Where an officer looks through a window and sees a felony being committed, we must assume, before the foregoing would apply, that his observations were made in a legal fashion. That is to say that either the window were so situated that a view of the interior were possible from the public thoroughfare or that the officer had reasonable grounds to believe that a crime was being committed within the private property which he had entered to make his observations. Under these conditions, the answer to question number two would be answered in the affirmative.

Where a police officer has trespassed unto private property, with no reasonable ground to believe that a crime was being perpetrated, and then observes the commission of a crime, the arrest would be unlawful and all searches and seizures incident to that arrest would be illegal. Florida Constitution, Declaration of Rights, §22. Also see the case of *Boynton v. State*, 64 So. 2d 536 (Fla. 1953) where the court held that the arrest made after breaking into a room containing gambling paraphernalia, where no reasonable cause was shown to break into the room, was unlawful.

JUDGMENT AND SENTENCE

August 6, 1954.—054-189.

COUNTY JUDGE'S POWER—ENFORCEMENT—
PENALTY—DRUNKEN DRIVERS

QUESTIONS: 1. "Where a defendant is convicted of driving while intoxicated and subject to the penalty of a fine of \$500 and a sentence of 6 months, is it within the judge's power to sentence the defendant to serve 6 months in the county jail and a fine of \$500, and if the \$500.00 be not paid by the defendant then an additional period of time be served in jail, such additional period being up to an additional 6 months?"

2. "If the answer to the above question is negative, then what can be done to enforce the payment of the \$500.00 fine after the prisoner has served his 6 month sentence, if he fails or refuses to pay it and has no assets?"

*To: Honorable Keith E. Collyer, County Prosecuting Attorney,
Avon Park, Highlands County, Florida:*

AS TO QUESTION ONE:

Upon the authority of the case of Lyle, Sheriff, v. Walter, 131 So. 383, I think that your first question is properly answered in the negative. Section 317.20(2), F.S., provides the penalties for driving while under the influence of intoxicating liquor. Under this statute, viewed in the light of said case, the county judge may sentence a violator to serve six months in the county jail and to pay a fine of not more than \$500, or both, but after imposing a six months jail sentence he cannot impose an additional jail sentence for failure to pay the fine.

On the 14th day of April, 1952, Circuit Judge Joseph S. White arrived at a like conclusion in an analogous case which came before him by way of habeas corpus proceedings. (B. W. Jones v. Nathan Mayo, et al., Circuit Court of Palm Beach County.)

Lest it be thought that §921.14, F.S., providing that whenever a court shall sentence a person to pay a fine or a fine and costs such court shall also provide in the sentence a period of time for which such person shall be imprisoned in default of the payment of the same, enacted in 1939 after the decision in Lyle v. Walter, in any wise affects the situation, I point out that at the time of said decision a similar statute, §8420, C.G.L., was in force and was cited by the unsuccessful appellant sheriff in his appeal brief in the Lyle v. Walter case.

AS TO QUESTION TWO:

Section 922.02 provides that if the sentence imposes a fine, with or without imprisonment, execution may be issued thereon as on a judgment in a civil action. I know of no other provision of law whereby the payment of the \$500 fine in question can be enforced and, since you state that the defendant has no assets, it is apparent that the issuance of an execution would be fruitless. Therefore, I know of no way to enforce the collection of the fine.

PRELIMINARY EXAMINATION

July 27, 1953.—053-172.

COUNTY JUDGE AS COMMITTING MAGISTRATE— PRELIMINARY EXAMINATION—TRIAL JURISDICTION—MISDEMEANOR

QUESTION: Is the county judge as committing magistrate precluded from conducting a preliminary examination in a case (misdemeanor) over which he has trial jurisdiction?

To: *Honorable W. Troy Hall, Jr., County Judge, Tavares, Florida:*

I see no reason to doubt the correctness of the Supreme Court's statement in *Davis v. State*, 65 So. 2d 307, that:

"The magistrate conducting a preliminary hearing must be an officer not empowered to try and determine the offense. Section 902.01, F.S.A."

Section 901.01, F.S., makes a county judge a committing magistrate without imposing any limitations upon his power to act as such. However, this statute must be read in conjunction with §§902.01 et seq., which provide for preliminary hearings to be held by magistrates only when the offense is one which he is not empowered to try and determine. Also all of these statutes are to be read together with §§937.01 through 937.05 (formerly §§8433 through 8436 and 8450 C.G.L.), which were held in *State ex rel. Oliver v. Moorhead*, 10 So. 2d 576, to provide the exclusive method for prosecuting in county judges' courts criminal cases which such courts have the right to try and determine. The said last cited statutes make no provision for county judges to hold preliminary hearings in criminal cases which they have the right to try and determine; rather, the procedure therein provided excludes the idea that preliminary hearings are to be held in such cases.

Therefore, I think that the above stated question is properly answered in the affirmative.

I regret that I cannot answer for you the other question propounded by your said letter because it relates to matters which do not involve your official duties or powers.

August 4, 1953.—053-184.

DEPUTY SHERIFF OR CONSTABLE—WITNESS FEES AND MILEAGE

QUESTION: Is a bonded deputy sheriff or constable entitled to a witness fee and mileage for appearing as a witness before the prosecuting attorney or state attorney prior to the filing of an information or indictment in a criminal case?

To: *Honorable Stanley C. Burnside, Clerk of Circuit Court, Pasco County, Dade City, Florida:*

We find no provision allowing the prosecuting attorneys of the County Judge's Court of the state to summons witnesses to appear before them, or any other legislation granting such authority to

the prosecuting attorney of the County Judge's Court of Pasco County. The question presented by you will, therefore, be limited as to whether a deputy sheriff or constable is entitled to a witness fee and mileage for appearing before the state attorney.

Section 27.04, F.S., 1951, authorizes the state attorney to summons witnesses by the process of his court to appear before him in or out of term time at such convenient places in the county where such witnesses reside, to give testimony as to the violation of the criminal laws, and he is empowered to administer oaths of all witnesses summoned to testify.

Section 902.19(4), F.S., 1951, provides as follows:

"No sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or other person employed or paid by the state or any county thereof as a law enforcement officer, shall be entitled to witness fees or mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence."

The precise question now to be resolved is whether a sheriff or one of his deputies or a constable, when summoned to appear before a state attorney to give testimony, would be testifying within the provisions of §902.19(4), and thereby be prohibited from receiving a witness or mileage fee. There is no decision of our Florida Supreme Court on this question. Section 902.19(4) prohibits payment of witness fees and mileage to the law enforcement officers enumerated therein when summoned to testify in any court sitting in the county in which he holds office, is employed, or is a resident. The state attorney, when summoning witnesses to appear before him under the provisions of §27.04, uses the process of his court to do so. The purpose of this procedure is for him to obtain evidence for possible prosecution and thereby is in the nature of a court proceeding. The witness, however, would not actually be testifying in court. The Florida Supreme Court in *State vs. Coleman*, 138 Fla. 520, 189 So. 691, has ruled that a witness is not appearing in court when he was summoned to testify before a state attorney under §27.04. The court said as follows:

"It may be noted that the witness is required to appear before the State Attorney, not before a court, and the witness is not required to appear in court; he may be required to appear at 'convenient places'..."

The court in this case upheld a conviction for perjury for testimony given before an assistant state attorney.

Section 932.29, F.S., 1951, provides that persons are not to be excused from testifying in certain prosecutions on the ground that their testimony might incriminate them and provides for immunity from prosecution. The statute provides specifically that no person shall be excused from attending and testifying or producing any book, paper or other document before any court upon any investigation, proceeding or trial.

The Florida Supreme Court in *State vs. Hancock*, 146 Fla.

693, 1 So. 2d 609, held that a person is immune from prosecution under §932.29 for testimony given when summoned to testify before the state attorney. The language used in §932.29 providing "before any court upon any investigation, proceeding or trial" is sufficiently broad enough to include a proceeding before the state attorney but it is questionable whether the provisions of §902.19(4) providing "when summoned to testify in any court sitting in the county" would extend to such a proceeding.

Former Attorney General Gibbs ruled that §43(d) of the Criminal Procedure Act, now §902.19(4) F.S., 1951, would not prohibit payment of witness fees and mileage to law enforcement officers for testifying before the state attorney or county solicitors in investigations conducted by him preparatory to filing informations in criminal cases. (See Biennial Report of the Attorney General, 1939-40, page 89; Florida Sheriff's Manual, page 187). I concur with this previous ruling until it is judicially determined otherwise. We realize that although the language used in §902.19(4) seems to restrict the payment of witness and mileage fees to the law enforcement officers only when testifying in court. However, the legislative intent might have been to prohibit such officers from receiving such fees and mileage when testifying in any court or proceeding, although such intent is not shown in the statute.

We recommend, therefore, that if there is still doubt as to the interpretation of this statute that it be settled with finality in an appropriate judicial proceeding.

July 17, 1953.—053-154.

COUNTY OBLIGATION—COURT COSTS—COMMITTING MAGISTRATE—PRELIMINARY EXAMINATION —DISMISSALS

QUESTION: Is it the duty of a board of county commissioners to pay the cost bill of a justice of the peace or a county judge who is acting as a committing magistrate when a warrant has issued, a preliminary examination has been held and the accused has been dismissed for lack of sufficient evidence to bind him over to a court with jurisdiction to try the offense with which he was charged?

To: *Honorable William K. Love, Attorney, Board of County Commissioners, Polk County, Lakeland, Florida:*

It is provided in §902.13, F.S. that "After hearing the evidence, if it appears that an offense has not been committed or that, if committed, there is not probable cause to believe the defendant guilty thereof, the magistrate shall order that he be discharged." Art. 16, Sec. 9, Fla. Const., provides that "In all criminal cases prosecuted in the name of the State when the defendant is insolvent or discharged, the legal costs and expenses, including the fees of officers, shall be paid by the counties where the crime is committed, under such regulations as shall be prescribed by law..."

In Attorney General's Opinion 042-230, dated May 8, 1942, it was concluded that a county could not refuse to pay the fees of

a justice of the peace where an affidavit was made by an officer in good faith before a committing magistrate charging a misdemeanor or crime and where, upon preliminary examination, it was determined that the defendant should be discharged rather than bound over to the circuit court.

Subsequently, in Opinion 049-54, dated February 11, 1949, the same conclusion was reached in answer to the third question presented in that opinion. Both of these opinions were based on a consideration of the effect of the ruling in the case of Barrow et al vs. State, 77 Fla. 776, 82 So. 294. A companion case found on the preceding page in the same volume of the Southern Reporter has been relied on by some as authority for the proposition that a committing magistrate is not entitled to any costs unless an indictment or information is filed. (See Attorney General's Opinion 049-508, dated October 24, 1949, which is contra to the opinions previously mentioned herein). This is not the holding of the court in the case represented in 82 So. 293, and it is not the intention of §939.14, F.S.

The last cited section operates to relieve a county of the obligation to pay a committing magistrate's costs only when (1) he binds a case over to one of the courts mentioned in the statute and (2) when an information or indictment is not found against the person charged with the offense. Both elements must be present before §939.14 is effective. Both elements were present in the case reported on Page 293 of Volume 82, Southern Reporter. But in the case reported on Page 294 of Volume 82, an examination of the transcript of record shows that the committing magistrate in this case had discharged the defendant after the preliminary examination, that he had not bound him over for trial, and that the magistrate was held by the circuit court to be entitled to receive his costs from the county. The Supreme Court in affirming the holding of the circuit court expressed its approval of the proposition that a justice of the peace is entitled to receive his costs from the county upon the discharge of a defendant following his preliminary examination.

The provisions of Art. 16, §9, Fla. Const. and of §939.06 and §142.09, F.S. indicate that the county rather than the defendant shall be liable for costs, including the fees of officers, when a defendant is discharged. Of course, if any portion of such a claim for costs is not just, correct or reasonable within the contemplation of §142.11, F.S., the county may reject the claim and refuse to pay the costs involved.

In view of the above considerations it is my opinion that when a committing magistrate discharges a defendant after a preliminary examination, the county is obligated to pay all just, correct and reasonable costs of the proceedings irrespective of the fact that in a proper case a prepayment of costs may have been made or security given for their payment. Attorney General's Opinion 049-508 and any other opinions that conflict with the conclusions reached herein are amended to the extent necessary to bring them into conformity with this opinion.

BAIL

July 24, 1953.—053-170.

SHERIFFS—BAIL—RELEASE OF DEFENDANT—
VIOLATION UNDER §903.35, F.S.

QUESTION: "When a court has set a bail for a defendant, may the sheriff release the defendant in the custody of his lawyer in lieu of the posting of the bail?"

To: *Honorable James M. (Red) McEwen, State Attorney, Tampa, Florida:*

The laws of this state do not give the sheriffs any power whatsoever to admit to bail. The only authority given them is to approve the bail, §903.34 F.S.

Section 903.35 F.S., expressly makes it a misdemeanor for a sheriff to:

- a. take bail which he knows is insufficient, or;
- b. accept a surety knowing that the surety is not qualified.

If the sheriff were to release a defendant to his lawyer and require the posting of less bail than that to which the defendant was admitted by the court he would have violated §903.35, F.S., by taking insufficient bail.

If the sheriff were to release a defendant to his lawyer and not require the posting of *any* bail where the defendant has been admitted to bail, the sheriff would be guilty of:

- a. Contempt—Ex parte Shivers, 195 Fed. 627;
- b. Common Law Escape—State ex rel Farrior v. Faulk, 102 Fla. 886, 136 So. 601 and 19 Am. Jur., 362, Section 5.

If the sheriff were to release the defendant to his lawyer with an understanding that the lawyer would be surety for the bail, he would have violated §903.35 F.S., in accepting an unauthorized surety because an attorney is disqualified from acting as surety on any undertaking by virtue of §903.07 F.S.

The action of an attorney in trying to persuade a sheriff to release a defendant under such circumstances and, hence, to violate the law is reprehensible and certainly a violation of the Canon of Ethics.

October 12, 1953.—053-266.

BAIL BONDS—ATTORNEY AS AGENT FOR SURETY
COMPANY—SIGNATURE PROHIBITED—§903.111,
F.S., 1953.

QUESTION: "Can a lawyer be an agent for a surety company, sign bail bonds as its attorney in fact, and still defend the principal in court?"

To: *Honorable Clifton M. Kelly, County Solicitor, Polk County, Bartow, Florida:*

This question should clearly be answered in the negative.

The clear intent of the Legislature appears in Ch. 28153, Acts of 1953, where it states that a bail bondsman cannot:

"(5) participate in the capacity of an attorney at a trial or hearing of one on whose bond he is surety."

In my opinion, furthermore, §903.07, F.S., 1951, also prohibits this practice.

June 2, 1953.—053-116.

**BAIL BOND—RELEASE OF OBLIGOR—AUTHORITY IN
COUNTY WHERE JUSTICE OF PEACE HAS NO
CRIMINAL TRIAL JURISDICTION—§§903.20,
903.21, F.S.**

QUESTION: Does a justice of the peace who has no trial jurisdiction in regard to criminal offenses, have authority to exonerate obligors on a bail bond from liability upon the surrender of the defendant prior to a forfeiture of the obligation?

To: *Honorable E. O. Duckworth, Justice of Peace, Orange County, Orlando, Florida:*

Section 903.12, F.S., reads in pertinent part as follows:

"(1) If a person is admitted to bail for his appearance for a preliminary examination, or on a charge that a magistrate is empowered to try, the condition of the undertaking shall be that he will appear for such examination....

"(2) If he is admitted to bail after he has been held to answer by a magistrate, or after an indictment has been found or an information filed against him, the condition of the undertaking shall be that he will appear to answer the charge before the court in which he may be prosecuted..."

Section 903.20, F.S., authorizes a surety to surrender a defendant for whom he has posted bond to the official who had custody of the defendant at the time the bail was taken, or to the official into whose custody he would have been committed had he not been released on bail. After a defendant has been surrendered to the proper official "...the court before which the defendant has been held to answer, or the court in which the preliminary examination, indictment, information or appeal, as the case may be, is pending, shall...order that the obligors be exonerated from liability of their undertakings..." (§903.21, F.S.).

Unless a justice of the peace court having no trial jurisdiction can be described as the "court before which the defendant has been held to answer," the only court that can have authority to release the defendant's surety after the completion of the preliminary examination is the court before which the indictment or information or appeal is pending. It is reasonable to assume that in its

context the phrase "held to answer" is an abbreviation of a more lengthy statement to the effect that on the basis of the facts revealed the defendant should be required to answer, before the appropriate trial court, the charges filed against him.

On the basis of these observations, it is my opinion that the question should be answered as follows:

(1) If a justice of the peace has released the defendant under a bond which is conditioned upon the defendant's appearing before the justice for a preliminary examination, he may exonerate the obligors on the defendant's bond if they follow the procedure outlined in §§903.20 and 903.21, F.S.

(2) Otherwise, the justice of the peace having no authority to try the defendant, the preliminary examination having been completed, and the defendant having been bound over to a court with jurisdiction to try the defendant, the justice of the peace may not be called upon to exonerate the obligors on the defendant's bond since he is not the court before which defendant has been held to answer or before which any hearing is pending.

December 29, 1953.—053-340.

COUNTY JUDGE'S COURT—GAME VIOLATORS—GUNS AS
APPEARANCE BONDS—SALES OF—POOLROOM
OPERATED SUNDAYS PROHIBITED

QUESTIONS: 1. May the County Judge's Court forfeit and sell guns of game violators, posted as appearance bonds, when said game violators fail to appear?

2. Does §855.01, F.S., prohibit the operation of a poolroom in an unincorporated area on Sundays?

To: *Honorable Tom Treadwell, County Attorney, Everglades, Florida:*

QUESTION 1: A very casual reading of Ch. 903 of the Criminal Procedure Act reveals that there is and was no authority for the acceptance of these guns as bail bond for these defendants. See: Section 903.35, F.S. It is a rule in many jurisdictions that where one deposits money in lieu of bail with an officer not authorized to accept it, the money so deposited is not recoverable by the depositor after forfeiture of the bail, for the depositor is considered to have waived the irregularity.

We find no Florida cases directly in point covering this situation, therefore, unless and until our Florida Supreme Court rules otherwise, I am inclined to feel that the deposit or posting of the personal property with the officer, although not authorized by law and illegal, was in the nature of a pledge of such property to secure the payment of a personal bail bond (see: 8 C.J.S. 108, §52) and was not intended to have the same effect as a cash bond. Although the deposit or pledge may have been unauthorized in law, I feel that in case of the breach of the personal bond, a lien, probably in the nature of an equitable lien, arose and may be enforced in a proper proceeding, which might be by foreclosure. Apparently, under the

authority above cited, it would be proper for these guns to be declared forfeited and sold provided these cases were not dismissed as discussed on page 114 of 8 C.J.S.

QUESTION 2: Section 855.01, F.S., in part, provides:

"Whoever follows any pursuit, business or trade on Sunday, either by manual labor or with animal or mechanical power, unless the same be work *necessary to furnish essentials and ordinary aids to the public*, shall be punished by a fine of not more than two hundred fifty dollars; ..." (Emphasis supplied)

The Supreme Court in *Hooks v. State*, 58 Fla. 57, 50 So. 586, in construing the statute which was the same except for the under-scored words, said that this being a criminal statute, it must be strictly construed; that clearly the pursuit, business or trade which requires manual labor or animal or mechanical power to perform it is prohibited.

We understand that a justice of the peace in your county wishes to know whether or not the operation of a poolroom on Sunday is prohibited by this statute. While we do not know the facts, it appears that the operation of a poolroom must of necessity involve some manual labor.

September 10, 1954.—054-220.

PROSECUTING ATTORNEY—BAIL BONDS— ENFORCEMENT OF FORFEITURES

QUESTION: In connection with the enforcement of bail bond forfeitures as prescribed by §903.28, F.S., where bail bonds which were returnable before a Criminal Court of Record have been declared forfeited by the Judge of the said Criminal Court of Record, and said §903.28, F.S., requires the "prosecuting attorney" to file certified copies of the orders of the Court or Judge forfeiting the same in the office of the Clerk of the Circuit Court, do the words "prosecuting attorney" mean the County Solicitor who is the prosecuting officer of said Criminal Court of Record in which said bail bonds were forfeited, or do they mean the State Attorney who is the prosecuting officer of the Circuit Court of the County in which said Criminal Court of Record is located, and is it the duty of said County Solicitor or said State Attorney to secure the entry of judgments and handle these cases to their conclusion, including the proceedings for remission of said judgments provided for by §903.29 and §903.30, F.S., which require at least five days notice to the "prosecuting attorney of the County"?

To: *Honorable William A. Hallows, III, State Attorney, Jacksonville, Duval County, Florida:*

By opinion No. 041-533, dated September 16, 1941, my immediate predecessor in office expressed the following opinion:

"It is my opinion that the 'Prosecuting Attorney' referred to in §71 (§903.28, F.S.) means the officer charged with the duty of prosecuting the particular case in which

the bail bond is given, and it is his duty, upon such bail bond being forfeited, to perform the ministerial act of filing a certified copy of the Order of Forfeiture in the office of the Clerk of the Circuit Court. The Circuit Judge is thereupon required to enter judgment against the person bound by the undertaking.

"It is further my opinion, that in the event of any further proceeding on this judgment in the Circuit Court, it is the duty of the State Attorney, under §4739 C.G.L. (§27.02, F.S.), to represent the State in such proceeding, except in those counties where the boards of county commissioners have, pursuant to the provisions of special or local laws, contracted with private attorneys for the collection of criminal bail bond."

My immediate predecessor reiterated the same views in his opinion No. 047-110, dated April 11, 1947.

I do not agree with that part of said ruling which held that it is the State Attorney's duty to handle further proceedings on the judgment. It is true that §27.02, F.S., requires that:

"The state attorney shall appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications or motions, civil or criminal, in which the state is a party."

However, §§903.28 and 903.30, F.S., which were enacted as a part of the Criminal Code long after the enactment of §27.02, read as follows:

"903.28 *Enforcement of forfeiture.*—If the forfeiture is not discharged, and the undertaking is one secured otherwise than by the deposit of money or bonds, the *prosecuting attorney* shall immediately after the lapse of thirty days after the date of forfeiture, but in any event within one year from said date, proceed against the defendant or any surety upon his undertaking as follows: The *prosecuting attorney* shall file a certified copy of the order of the court or judge forfeiting the same, in the office of the clerk of the circuit court of the county wherein such order shall have been made, and thereupon the judge of the circuit court in said county shall enter judgment against the person bound by the undertaking for the amount of the penalty of said undertaking, and execution shall be issued to collect the amount of said undertaking." (Emphasis supplied)

"903.30 *Application for remission of forfeiture; how made and on what terms granted.*—Application to set aside or modify the judgment shall be made within twenty-five days from the entry of judgment and shall be accompanied by affidavits setting forth the facts on which it is founded; and shall be upon at least five days' notice to the *prosecuting attorney of the county*. The notice shall be accompanied by a copy of the affidavit and of any other paper

on which the application is founded. The application shall be granted only upon payment of the costs and expenses incurred by the county in the proceedings for the enforcement of the forfeiture unless it is granted on the ground that there was no breach of the undertaking." (Emphasis supplied)

It is my opinion that the words "the prosecuting attorney", as used in §903.28, and the words "the prosecuting attorney of the county", as used in §903.30, refer to the same prosecuting attorney, viz, the prosecuting attorney of the court in which the bond is taken and forfeited, whether such prosecuting attorney be the county solicitor or the state attorney or the county prosecuting attorney. And I think that said statutes, being later enactments and being specifically designed to provide for the handling of proceedings looking to the collection of estreated bail bonds, govern rather than §27.02. In other words, it is my opinion that if the bond is taken and forfeited in the Circuit Court, it is the duty of the state attorney to handle the forfeiture proceedings and if the bond is taken and forfeited in the Criminal Court of Record, it is the duty of the county solicitor to represent the State in the proceedings contemplated by §§903.28 and 903.30, and if the bond is taken and forfeited in the County Court or the County Judge's Court, it is the duty of the county prosecuting attorney to represent the State in such proceedings.

The above quotation from the opinion of my predecessor recognizes, and I agree, that the words "the prosecuting attorney", as used in §903.28, mean the officer charged with the duty of prosecuting the particular case in which the bail bond is given, and I point out that it is illogical to so hold and at the same time ignore and refuse to give like effect to the words "the prosecuting attorney of the county," as used in §903.30.

There is good reason why the legislature designedly imposed the duty of handling proceeding under said statutes upon the prosecuting attorney of the court in which the bond is taken and forfeited. Said prosecuting attorney is more familiar with the circumstances surrounding the defendant's failure to appear in his court and with all the facts relative to the forfeiture of the bail bond and thus is in a much better position to deal with the entire matter, including applications for remission of judgments entered on bail bonds when such applications are filed pursuant to §§903.29 and 903.30.

GRAND JURY

March 5, 1954.—054-57.

COUNTY SOLICITOR—CRIMINAL INVESTIGATIONS —WITNESSES—COUNSEL FOR

QUESTION: Where a witness is subpoenaed before a county solicitor, in the investigation of criminal charges against a third person, is such witness entitled to have his attorney present to represent him during the examination conducted by the county solicitor?

To: Honorable Richard H. Cooper, County Solicitor, Orlando, Florida:

In the case of *In re Black*, 47 F. 2d 542, Judge Augustus N. Hand, recognized as one of the ablest Federal judges in this country, speaking for the United States Circuit Court of Appeals of the Second Circuit, said:

"The appellant insists that, before a witness is compelled to testify before a grand jury, he should be apprised of the subject matter of the inquiry or the name of the persons against whom the inquiry is addressed, and that he should not be called upon to go unaided by counsel to an inquiry which is unlimited in scope and for which he is entirely unprepared. But the privilege of a witness against self-incrimination is personal. *Neither at a trial nor before a grand jury is he entitled to have the aid of counsel when testifying.* (Emphasis supplied).

The foregoing statement was quoted with approval by the United States District Court for the Eastern District of Missouri in the case of *United States v. Blanton, et al.*, 77 F. Supp. 812, in holding that a defendant is not entitled to the advice of counsel when before a grand jury.

Since, as stated in the above cited cases, a witness is not entitled to have the aid of counsel when testifying either at a trial or before a grand jury, it logically follows that he is not entitled to have the aid of counsel when testifying before a county solicitor who performs the same investigative functions that a grand jury would perform if the investigation were being made by the grand jury instead of by the county solicitor.

Although the Constitution gives an accused the right to counsel, I find nothing in either the Constitution, statutes, or common law which even remotely suggests that a witness has the right to be represented by counsel while testifying. Permitting witnesses before the county solicitor to bring their attorneys with them would in many instances tend to unnecessarily impede and hamper the interrogation of such witnesses by the county solicitor. If a witness wishes to claim his privilege against self-incrimination in cases where the statutes do not immunize him as the result of his being required to testify, he may claim the privilege himself without the necessity of having counsel present.

In my opinion, your question is properly answered in the negative.

PROCESS UPON INDICTMENT AND INFORMATION

March 31, 1953.—053-71.

HIGHWAY PATROLMEN—ARRESTS—APPEARANCE BOND
—CAPIAS ISSUE—REARREST—§907.01, F.S.
APPLICABLE—MONROE COUNTY

QUESTION: Where a highway patrolman makes an arrest

for a violation of the traffic laws of the state, accepting a bond requiring the appearance of such person before the Criminal Court of Record of Monroe County, in which court an information is thereafter filed against said person, must a capias issue and be served by the sheriff thus causing the rearrest of such person?

To: Honorable Thomas S. Caro, Judge, Criminal Court of Record, Monroe County, Key West, Florida:

An opinion rendered by this office, 049-480, based on the decision of *Bradford vs. Stoutamire*, 38 So. 2d 684, held that a sheriff was not entitled to an arrest fee, where such arrest is made by an officer of the State Highway Patrol, for to allow such fees to the sheriff for services rendered by the Highway Patrol who is paid a salary would be paying twice for the same service.

Florida Statutes, 1951, contain two statutory provisions relating to when a capias shall be issued. Section 907.01 provides in part as follows:

"Upon the filing of an indictment or information, if the person named therein is not in custody or at large on bail for the offense charged, the judge shall direct the clerk to issue immediately or when so directed by the prosecuting attorney, a capias for the arrest of such person..." Section 932.48 provides as follows:

"Same; duties of clerks of courts.—Upon the filing of an information, the clerk of the circuit court shall docket the information and shall, without leave or order of the court first being had and obtained, issue a capias for the arrest of the person charged; and the clerk shall likewise issue any and all other necessary process incident to the information."

Section 932.48 should it be applicable to the clerk of the criminal court of record of Monroe County, would be so by virtue of §32.11 which provides that the clerks of the criminal courts of record shall have the same duties, powers and obligations as the clerks of the circuit courts.

The reading of both §§907.01 and 932.48 reveals an apparent conflict between the statutes. Section 907.01 provides that the clerk shall issue a capias when directed by either the judge or the prosecuting attorney upon the filing of an indictment or an information, if the person named therein is not in custody or on bail, whereas §932.48 provides that the clerk shall issue a capias upon the filing of an information without leave or order of the court.

It is a rule of statutory construction that where two statutes, although of the same revision, are in irreconcilable conflict, the latest expression of the legislature will govern. See 59 C.J. 999, *Johnson v. State*, 157 Fla. 685, 27 So. 2d 276. The history of §932.48 shows it was enacted as §2, Chapter 17172, Laws of Florida, 1935. Section 907.01 was enacted as §130, Ch. 19553, Laws of Florida, 1939. Section 907.01 is the latest expression of the legis-

lature on the subject and is part of the Criminal Code of Florida adopted by the 1939 session of the legislature. Therefore, for purposes of this opinion §907.01 is the governing statute as to when a capias shall issue.

A capias for the arrest of a person under the provisions of §907.01 will be issued by the clerk when only so directed by the judge or the prosecuting attorney after an information or an indictment is filed against such person, and he is not in custody or at large on bail for the offense charged.

Section 321.05(4), F.S. 1951, provides in part as follows:

"...In all cases of arrest by patrol officers the person arrested shall be delivered forthwith by said officer to the sheriff of the county or he shall obtain from such person arrested a recognizance or, if deemed necessary a cash bond or other sufficient security conditioned for his appearance before the proper tribunal of such county to answer the charge for which he has been arrested...."

Accordingly, when the highway patrolman accepts the bond of the person arrested, it is conditioned for his appearance at the proper time to answer the charge. It is my opinion, without determining whether the accepting of bail is a judicial act that cannot be constitutionally delegated to a police officer, that a person is on bail within the meaning of §907.01 when a highway patrolman arrests him and accepts a bond under the provisions of §321.05(4). Therefore, a capias would not be issued upon the filing of an information, and it would be unnecessary to cause the rearrest of the person originally arrested by the highway patrolman.

The primary purpose of a warrant or capias is to grant authority to a sheriff or other law enforcing officer to arrest and hold in custody a person, or to bring him before the court. In the factual situation presented, the person has been once arrested and his bond accepted by the highway patrolman conditioned for his appearance before the proper tribunal. The county solicitor in his sound discretion may desire to prosecute upon the failure of the person arrested to appear at the proper time, in which case a capias would have to issue directing the sheriff to bring the person before the court.

JURISDICTION AND VENUE

August 19, 1953.—053-203.

TYNDALL AIR FORCE BASE, BAY COUNTY— CRIMINAL OFFENSES—JURISDICTION

QUESTIONS: 1. Do the Courts of the State of Florida have jurisdiction over criminal offenses committed within the boundaries of Tyndall Air Force Base, in Bay County, Florida?

2. Would the answer to No. 1 be different if nonmilitary personnel were involved, either as offender or victim?

3. Would the same answer apply in the case of a criminal offense of a continuing nature, such as larceny of an automobile?

To: Honorable Larry G. Smith, Assistant State Attorney, Panama City, Florida:

AS TO QUESTION ONE

The state courts have no jurisdiction over crimes committed on lands after the Governor of Florida has ceded exclusive jurisdiction thereof to the United States pursuant to §6.04, F.S. I am advised that the Governor has ceded to the United States, pursuant to said statute, exclusive jurisdiction of the lands located in Tyndall Air Force Base. Therefore, your question No. 1 is answered in the negative.

AS TO QUESTION TWO

Exclusive jurisdiction having been ceded to the United States, the state has no jurisdiction over criminal offenses committed on said lands regardless of whether military or nonmilitary personnel are involved as offenders or as victims.

AS TO QUESTION THREE

The rule at common law (and by statute, §910.10, F.S.) is that where a simple larceny is committed in one county and the thief carries the property into another county he may be tried in either county, the common law theory being that possession of the stolen goods by the thief is a larceny in every county through and into which he carries them, because, as the legal possession still remains in the owner, every moment's continuance of the trespass and felony amounts to a new taking and asportation. (22 C.J.S. 291-292, Criminal Law, §185; also see 32 Am. Jur. 1011, Larceny, Section 97).

If this common law theory (that every moment's continuance of the trespass and felony amounts to a new taking and asportation) should be literally applied in Florida, then the logical conclusion would be that a thief who steals a car on Tyndall Air Force Base and carries it outside of the Base into Bay County, or on into another county, could be prosecuted for the larceny in any county into which he thus carries it.

However, in jurisdictions where there are no controlling statutes, one of the reasons advanced by courts for permitting a thief to be prosecuted in either the county where he commits the theft or in any other county into which he carries it, is that no matter in which county the prosecution is had the same general law of the realm is applicable to the punishment of the thief, and a conviction in one county would be a bar to a second conviction in another. Otherwise stated, that the same law is violated, the same punishment is due, the rules of evidence and the law governing the proceedings are the same, and the question involved is merely a question as to where the trial shall be had, and wherever the trial is had, it is the same and the result is the same. (Ann.: 156 A.L.R. 864-865).

Said last mentioned reason does not apply where a thief steals a car on Tyndall Air Force Base and takes it outside of the Base

because, in such case, the law of the United States applies on the Base and the law of Florida applies outside of the Base, and because a conviction in the State court would not bar a prosecution in the Federal Court. Therefore, it might be that in such cases the courts would refuse to apply the theory that every moment's continuance of the thief's possession of the stolen goods amounts to a new taking and asportation, and they might hold that the state courts could not assume jurisdiction based upon that theory.

Nevertheless, it is possible that the courts would put such a construction upon §910.01, F.S., as would permit a state court prosecution where the car is stolen on Tyndall Air Force Base and carried outside. Said statute reads:

"Offense committed elsewhere but consummated here.—When the commission of an offense committed elsewhere is consummated within the boundaries of this state, the offender shall be liable to punishment here, though he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself. The jurisdiction in such case, unless otherwise provided by law, shall be in the county in which the offense was consummated."

In *Foster v. State*, 56 So. 945, the Supreme Court of Florida held that said statute permits a larceny prosecution in Florida where the theft is committed in another state and the thief consummates the crime in Florida by bringing the stolen goods into Florida and disposing of them or putting them to some practical use for his own purposes, to the detriment of the true owner.

Since Tyndall Air Force Base is under the dominion of the United States, and since Florida has no jurisdiction over crimes committed on said Base, it might be that the courts would hold that, when a car is stolen on said Base and carried outside and disposed of or put to a practical use for the purposes of the thief (as, for example, by driving it), the theft is "committed elsewhere" but "consummated within the boundaries of this state" within the contemplation of said §910.01.

In view of the uncertainty as to what the courts would hold, I suggest that the question cannot be answered authoritatively except by court ruling.

WAIVER OF JURY TRIAL

October 7, 1954.—054-233.

COURT OF CRIMES—JUDGE—RULES—WAIVER OF JURY TRIAL—DADE COUNTY

QUESTION: "As an accommodation to attorneys, the Honorable Ray H. Pearson, judge of the Court of Crimes in and for Dade County, having jurisdiction of misdemeanors, is desirous of announcing a rule of his court which will permit a defendant, through

counsel, to enter pleas of 'not guilty' and to either waive or request jury trial by written instrument, rather than requiring counsel to appear at the time of arraignment and verbally announce such plea and either waive or demand a jury trial. * * * Judge Pearson does not desire to make such a ruling without the sanction of your office and therefore an opinion is requested as to whether or not the above outlined procedure would be proper?"

To: Honorable John D. Marsh, County Solicitor, Miami, Dade County, Florida:

In my opinion No. 051-146, dated June 6, 1951, copy of which is enclosed herewith, I expressed the opinion that "a plea in a misdemeanor case must be pleaded orally in open court unless the defendant, at his own request and by leave of the court, enters a plea while absent, by attorney or in writing". That an absent defendant may enter a plea of not guilty through his counsel in a misdemeanor case is also borne out by the following quotation from 22 C.J.S. 702, Criminal Law, §452, as follows:

"It seems that in a prosecution for a misdemeanor a plea of not guilty may be made by accused through counsel, even in the absence of accused."

However, as to the matter of waiving jury trial, I point out that §912.01, F.S., provides that:

"In all cases except where a sentence of death may be imposed trial by jury may be waived by the defendant. Such waiver shall be made in open court and an indorsement thereof made on the indictment or information and signed by the defendant."

This statute expressly requires that a waiver of jury trial shall be made in open court and that an indorsement thereof be made on the indictment or information and signed by the defendant.

Therefore, it is my opinion that the judge of the Court of Crimes of Dade County, having jurisdiction of misdemeanors only, may properly announce a rule of court which will permit a defendant, through counsel, to enter a plea of not guilty and to request jury trial by written instrument instead of appearing in court to enter such plea and make such request.

However, even if such a rule should be promulgated and even if defense counsel should fail to file a written instrument requesting jury trial, the defendant would still be entitled to jury trial unless he waived it at some time or other in accordance with said §912.01. Because of said statute, such a rule could not properly provide for waiver of jury trial by instrument in writing filed by counsel and could not rightly provide that a failure to file a written instrument requesting jury trial would operate as a waiver of jury trial. As above indicated, such a waiver can be made only in open court with the defendant present and he must sign an indorsement of such waiver on the indictment or information.

Judge Pearson has also written to me about this matter and I am sending him a copy of this opinion and of my above mentioned opinion No. 051-146.

TRIAL JURY

June 3, 1954.—054-132.

JURORS—OATH—QUALIFICATIONS

QUESTION: In a criminal case should the following oaths be administered to the jurors:

1. An oath to tell the truth touching their general qualifications as jurors, such oath to be administered when the jurors show up in court in answer to their subpoenas;

2. An oath to tell the truth touching their competency to serve as jurors in a particular case, such oath to be administered when jurors are called into the jury box for the trial of such case; and

3. An oath to well and truly try the issues between the State of Florida and the defendant whom they shall have in charge and a true verdict render according to the law and the evidence, such oath to be administered to the jurors selected to try a particular case?

To: Honorable R. H. Rowe, Circuit Judge, Madison, Florida:

The only statutes which I find concerning the swearing of jurors in criminal cases are §§913.02 and 913.11, F.S. Section 913.02 says that the jurors shall be sworn to answer truthfully all questions put to them regarding their competence to serve as jurors. Section 913.11, F.S., prescribes the form of oath to be administered to jurors after they have been selected to try a case.

A juror possesses competency if he possesses "Legal fitness or qualification". (Ballentine's Law Dictionary). Therefore, it is my opinion that when jurors appear in answer to their subpoenas and are sworn to answer truthfully all questions put to them regarding their competence to serve as jurors, pursuant to §913.02, F.S., they are thenceforth on oath to truthfully answer all questions regarding their general qualifications as jurors and also all questions put to them concerning their legal fitness and qualifications to serve as jurors in any particular case. Consequently, I do not think that it is necessary to administer any oaths except those required by §§913.02 and 913.11. This view is in accord with the following statement found in 50 C.J.S. 1085, Juries, §294-a:

"Every jury is required to take two oaths: (1) The voir dire as to his qualifications, discussed supra §276.

(2) To try the particular case before the court."

However, if a judge should be of the opinion that jurors would be made more conscious of their obligation to tell the truth by administering to them an initial oath before examining them concerning their general qualifications and by following this with another oath when they are called into the jury box for the trial of the particular case and winding up with the oath prescribed by §913.11, I can see no reason why he may not lawfully do so.

CONDUCT OF JURY

April 21, 1954.—054-98.

CRIMINAL CASES—TRIALS—WOMEN JURORS—
WOMAN BAILIFF REQUIRED TO ATTEND—
§40.01(7), F.S.

QUESTION: Is it necessary that there be a woman bailiff each time there is a woman on a trial jury in a criminal case?

To: Honorable R. H. Amidon, Judge, Criminal Court of Record, Bartow, Polk County, Florida:

Section 40.01(7), F.S., provides as follows:

"That whenever female persons are sitting on any jury, and it becomes necessary that said jurors be committed to the charge of an officer, a female bailiff or deputy sheriff shall be provided to attend said jury in addition to the male officer to whom such juries are customarily committed, and all existing laws relating to the powers, duties and obligations of such male officer shall apply with like force and effect to such female officer."

Section 919.01(1), F.S., dealing with criminal cases, provides as follows:

"After the jury shall have been sworn they shall sit together and hear the proofs and allegations in the case, which shall be delivered in public and in the presence of the accused; and after hearing such proofs and allegations the jury shall be kept together in some convenient place until they agree upon a verdict or are discharged by the court, and the sheriff or a bailiff shall be sworn to take charge of the jury."

It thus appears that §40.01(7) requires that a female bailiff or deputy sheriff shall be provided to attend a trial jury whenever a female person is sitting on the jury and it becomes necessary that the jurors be "committed" to the charge of an officer.

It further appears from §919.01(1) that the jurors in a criminal case are required to be kept together during their deliberations and that "the sheriff or a bailiff shall be sworn to take charge of the jury."

A sheriff or a bailiff cannot "take charge of" a jury within the contemplation of §919.01(1) without the jurors being "committed" to the charge of such sheriff or bailiff within the contemplation of §40.01(7). In other words, I think that whenever the court swears a sheriff or a bailiff "to take charge of" the jury, the court "commits" the jury to the charge of such sheriff or bailiff.

I am of the opinion that §40.01(7) requires that a female bailiff or deputy sheriff shall be provided to attend the jury in a criminal case whenever there is a female person sitting on the jury

and a sheriff or bailiff is sworn at the end of the trial to take charge of the jury as required by §919.01(1) or if at any previous time during the trial the jurors are committed to the charge of an officer.

JUDGMENT AND SENTENCE

March 2, 1954.—054-51.

FLORIDA SHERIFF'S ASSOCIATION—BONDSMEN— FINE AND COST BONDS—§92.15, F.S. APPLICABLE

STATEMENT AND QUESTIONS: The Florida Sheriff's Association, seeking advice as to certain problems in connection with fine and cost bonds under §92.15, F.S.

The first question which deals with the surrender of the defendant by his bondsmen prior to the expiration of the 90-day period is fully answered in my opinion enumerated 049-175, a copy of which I am enclosing herein.

Your question two is as follows:

"A person is fined, after pleading guilty to a charge, \$100.00 and 30 days in jail, or in lieu of said fine, sentenced to serve an additional 60 days. The prisoner remains in jail for the 30 day period and then in lieu of paying the \$100.00 fine wishes to make a fine and cost bond for said sum.

"The query is: When is such bond returnable? Ninety days after a conviction and original incarceration, or 90 days after the date that the bond is issued?"

To: *Honorable John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee, Florida:*

I know of no helpful decisions with regard to the precise question. I feel, however, that the statute itself clearly gives the answer to the question. Until the defendant has served the mandatory 30-day period, he would not be in custody for the purpose of serving the sentence which is the alternative of the fine. The statute in question provides:

"Persons convicted of crimes, who shall have a pecuniary fine or sum of money assessed or adjudged against them as punishment therefor, shall have the right on being taken into custody by the proper officer of the court, or prior to such arrest, to give bail for the payment of such fine and the costs of prosecution."

Hence, since the taking of the bond would not be necessary until such time as the defendant is in custody for the purpose of serving the alternative jail sentence, the bond would issue at that time and the 90-day period would start running from the date of the issuance of the bond.

February 24, 1953.—053-44.

TRIAL COURT'S JURISDICTION—MODIFY SENTENCE

QUESTION: Have you, as a trial court, jurisdiction to modify a sentence, imposed by you, to be served in the state penitentiary, so as to allow the prisoner credit for time he spent in the County Jail?

To: *Honorable R. H. Amidon, Judge, Criminal Court of Record, Lakeland, Florida.*

In the case of *Tanner v. Wiggins*, Sheriff, 45 So. 459, the Supreme Court of Florida held as follows:

"The right of a trial court to suspend the imposition of a sentence is recognized in *Ex Parte Williams*, 26 Fla. 310; 8 So. 425; but the power of a court to suspend the execution of a sentence already lawfully imposed, except for the purpose of giving effect to an appeal, or where cumulative sentences are imposed, and perhaps in some cases of necessity and emergency, presents another question. It seems to us the weight of reason and authority is against the existence of such a power, *especially where, as with us, exclusive control over the subject of pardons and of commutation and mitigation of penalties is lodged by our Constitution in other officials than the judges of the courts.*" (Underscoring ours)

In the case of *Tucker, et al. v. State*, 131 So. 327, our Supreme Court held:

"As a general rule, after a trial court has regularly imposed a sentence and the term at which it was imposed has passed, the power of the trial court over such sentence is at an end, except for the purpose of its enforcement. *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718."

In the case of *Smith v. Brown*, Sheriff, et al., 135 Fla. 830, 185 So. 732, our Supreme Court held:

"...during the same term of court at which the sentence is imposed, before the defendant has begun serving such sentence, the trial judge has the power to modify such sentence." (underscoring ours)

See also: 8 R.C.L. 244, §247:

"247. Amendment after complete or partial execution Where a judgment has been fully satisfied by a defendant, the trial court has no power to amend it by increasing the punishment after the term at which the judgment was rendered, or even during said term. * * * Thus it has been held that where a court has imposed a fine and imprisonment when the statute confers power only to punish by fine or imprisonment, and the fine has been paid, the court cannot, even during the same term, modify the

judgment by imposing imprisonment instead of the former sentence, and, the judgment having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end. *The rule seems to be well established that the trial court is without power to set aside a criminal judgment after it has been partly satisfied by the defendant, and impose a new or different judgment increasing the punishment, even at the same term of court at which the original judgment was imposed.* And of course a judgment which has been partly satisfied by the defendant cannot be set aside by the trial court and a new judgment increasing the punishment imposed, after the term of court at which the first judgment was entered." (underscoring ours)

In support of the above text, the author cites *State v. Meyer*, 86 Kan. 703, 122 P. 101, 40 L.R.A. (NS) 90, Ann. Cas. 1913C, 278, in which it was held:

"The court found the defendant guilty of contempt and entered judgment that he be committed to the jail of the county for three months and pay a fine of \$100. After he had been imprisoned under this judgment for twelve hours, he was recalled and the court attempted to render a second or modified judgment sentencing the defendant to six months imprisonment and the payment of a fine of \$100. Held, that as the first sentence was one the court had authority to impose, and the defendant had suffered punishment under it, there was ~~then~~ no authority in the court to change and increase the punishment; and further held that the first judgment is valid and still enforceable."

Our Court cited the above Ruling Case Law excerpt with approval in the case of *Smith v. Brown*, supra.

In the case of *State ex rel. Rhoden v. Chapman*, 127 Fla. 9, 172 So. 56, our Court held:

"*It is beyond the power of a court of criminal jurisdiction, after the adjournment of the term of court at which a sentence to imprisonment is imposed upon one adjudged guilty of a felony, to set aside, vacate, or annul it or to change it in any substantial respect to defendant's prejudice, absent the defendant's consent, unless it is done pursuant to appropriate proceedings for resentence.* *People v. Sullivan*, 54 Misc. 489, 106 N.Y.S. 143. (underscoring ours)

"*But where at the request of a convicted defendant, or at his instance or approval given during the same term at which a criminal sentence is imposed, the court has vacated or annulled its presently imposed sentence, and deferred the proposition of imposing a new sentence to a subsequent term of court at which the case is continued pending which continuance the defendant is released on bond, the court may, at such subsequent term, impose a*

new sentence upon the original judgment of conviction, even though such new sentence is greater, or materially different in effect from that first imposed and thereafter vacated. See Preston v. State, 117 Fla. 618, 158 So. 135; Ingram v. Prescott, 111 Fla. 320, 149 So. 369; Lovett v. State, 29 Fla. 384, 11 So. 176, 16 L.R.A. 313." (underscoring ours)

From the above-cited cases, I have concluded that, generally, the trial court's jurisdiction ceases as soon as the defendant starts serving on a sentence, except for the purpose of enforcing the same and in some cases of necessity. However, the trial court can, during the term in which it imposes a sentence, at the instance of or with the consent of the defendant, given during said term, amend the original sentence in such a way that the time which the defendant has to serve thereon is lessened by the amount of time he spent in the County Jail awaiting his trial and sentence.

PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW

April 13, 1953.—053-81.

WITNESS—VOLUNTARY ATTENDANCE—FEE OR MILEAGE—PAYMENT

QUESTION: A witness subpoena issued out of the Criminal Court of Record of Palm Beach County directed to a former employee, was delivered to the Miami office of the State Beverage Department where such former employee had been located. The subpoena was not served upon the witness but he voluntarily traveled from his home in Tallahassee to West Palm Beach and testified in a criminal case therein pending. Is the witness entitled to mileage from either Miami or Tallahassee, to West Palm Beach?

To: *Honorable L. H. Brannon, Assistant County Solicitor, Palm Beach County, West Palm Beach, Florida:*

The relevant statutes relating to witnesses and payment of their compensation are found in §§90.14, 90.15, 142.04, 142.05, 142.06, 142.07 and 932.33, F.S., 1951. There is no requirement in the statutes making it mandatory that a subpoena be duly served upon the witness in order for him to be entitled to compensation, where he voluntarily appears and testifies. Inasmuch as the witness has been employed in Dade County and the prosecution was had in Palm Beach County, it is unnecessary to determine whether or not a person formerly employed as a law enforcement officer may, after the termination of his employment be paid a witness fee where his testimony relates to duties performed while a law enforcement officer. Under §902.19(4), F.S., 1951, a person employed as a law enforcement officer is not entitled to witness fee or mileage "...when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence."

My immediate predecessor in office determined that where a

witness is not subpoenaed, but testifies for the state in a criminal case in a criminal court of record, he is entitled to sign the payroll and be paid for attendance for the day he testified (1947-1948 Biennial Report, page 50).

There are various rules relating to the compensation of a witness who voluntarily attends without being subpoenaed or properly subpoenaed. One holds that the witness is entitled to per diem and mileage while in other jurisdictions, it is a matter which the court in the particular case determines the propriety of the compensation. Still in other jurisdictions, the witness is entitled to per diem but not to mileage, while still others deny him both per diem and mileage.

There is an intimation in the case of *Vilsack v. General Commercial Securities Corp.*, 106 Fla. 296, 143 So. 250, that the court might approve the payment of the per diem and mileage to a witness who had not been subpoenaed. (See concurring opinion of Justice Brown).

Had the witness been duly served with subpoena at Tallahassee, he would have undoubtedly been entitled to mileage. Having appeared and testified, the service of the subpoena upon him at Tallahassee would have done no more than add the officer's fee for such service to the costs in the case.

It appears to me that the mileage of the witness from Tallahassee may be properly paid him where his testimony was necessary for a proper presentation of the State's case.

SEARCH WARRANTS

February 4, 1953.—053-26.

LOTTERY RAIDS—SEARCH AND SEIZURE—INVENTORY RECEIPTS—VALIDITY—§933.11, F.S.A.

STATEMENTS: 1. A raid was made on the home of a person suspected of conducting a lottery. The raid was made under a search warrant and a large amount of cash, coins and small bills together with some other evidence of a lottery was seized under this search warrant issued by the Judge of the Circuit Court. In compliance with §933.11, F.S.A., a duplicate copy of the search warrant was served on the person who answered the door. The property was seized, but no inventory was taken on the premises and no receipt for the property seized was delivered to the person upon whom the warrant was served. The money seized and the other evidence was listed upon its arrival at the County Jail and within the ten day period, a return was made in compliance with §933.11, F.S.A., such return including an inventory.

2. Another raid was made on the home of a person suspected of conducting a lottery under a search warrant issued by the Circuit Judge. Again a large amount of cash, coins and small bills was seized. The money at the time it was seized was in tubs, garbage cans and similar containers. The person named in the search warrant was arrested at the time of the seizure and was taken to

the County Jail together with the property seized. No inventory was taken and no receipt given when the evidence seized was taken from the searched premises, however, the evidence seized in the form of money was counted in the presence of either the defendant or a member of his family who was present at the time of arrest and the other evidence seized was inventorized in the similar manner. The defendant arrested was not present at all times during the time that the inventory was being prepared and the money counted. It took approximately four or five hours to count the money by the use of coin counting device borrowed from a bank. A copy of the inventory and a receipt was served upon the defendant at the end of this period of time and a return was made to the search warrant which included a sworn inventory.

QUESTIONS: 1. Does the failure of the officer to serve the person upon whom the warrant was served with a copy of the inventory and the receipt, void the seizure and make it inadmissible in a trial?

2. Was the seizure voided by the procedure followed and is the evidence admissible?

To: *Honorable Vivion B. Rutherford, Assistant County Solicitor, Dade County, Miami, Florida:*

It is my opinion that the property seized in both situations would not be inadmissible for the failure to take an inventory on the premises or to deliver a receipt to the person upon whom the warrant was served.

Section 933.11, F.S., 1951, reads in part as follows:

"When property is taken under the warrant the officer shall deliver to such person a written inventory of the property taken and receipt for the same, specifying the same in detail, and if no person is found in possession of the premises where such property is found, shall leave the said receipt on the premises."

This portion of §933.11, F.S., 1951, has never been construed by the Florida Courts.

Section 662, Title 18, U.S.C.A., reads as follows:

"When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property. (June 15, 1917, c. 30, Title XI, §12, 40 stat. 229)."

It can be readily seen that the two sections are almost word for word.

In the case of *United States v. Kaplan*, 286 Fed. 963, the District Court of Georgia said:

"The officer who takes the property under the war-

rant must give a copy of the warrant, together with a receipt for the property taken (specifying it in detail), to the person from whom it was taken by him or in whose possession it was found, or in the absence of any person he must leave a copy of the warrant and the receipt in the place where he found the property. The officer must forthwith return the warrant to the judge or commissioner and deliver to him an inventory of the property taken, made publicly or in the presence of the person from whom it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect:

'I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.'

"It is believed that all of the foregoing requirements are demanded by the Constitution or the statute, and that failure to observe any of them is bad practice. But such failure is not in every instance fatal, and statement will be made of what is essential and what is merely directory."

In the case of *United States v. Gaitan*, 4 Fed. 2d 848, the identical question here presented was passed on by the District Court of California as follows:

"The assertion that the search warrant itself 'is void and illegal', for the reasons that properly executed copies of the same were not delivered to the defendants, or that an appropriate inventory of the property seized was not subsequently made, if true, would seem to me to be unavailing. If a full inventory is desired for any purpose, by appropriate motion it can now be required. If the officer was authorized, however, under a valid search warrant, to enter the premises in question, and did obtain therefrom evidence which may lawfully and properly be introduced in court in furtherance of a prosecution, I know of no rule of reason or authority which would suffice to enjoin the government from making use of such evidence merely because the officer failed to deliver a properly executed copy of the warrant to the person in charge of the premises searched.

"A valid search warrant being held, authority to search and seize was granted, and a failure to deliver a copy of the warrant after a valid entry into the premises and search of the same, could hardly, in my judgment, suffice to reach back and invalidate such search and seizure."

In the case of *United States v. Callahan, et al.*, 17 Fed. 2d 937 (text 942), the District Court of Pennsylvania quoted with approval the language above quoted from the case of *United States v. Gaitan*, *supra*.

In the case of *Giacalone v. United States*, 13 Fed. 2d 108, the Circuit Court of Appeals for the 9th Circuit, in passing on the question here involved and in discussing the case of *Murby v. United States*, 293 Fed. 849, (C.C.A.) said:

"If the search warrant was valid and the original entry lawful, we cannot agree with the contention that the search was rendered unlawful by the mere failure of the officers to leave a copy of the warrant and a receipt for the property taken, or by the destruction of a large portion of the property found on the premises. *United States v. Clark* (D.C.) 298 F. 533; *United States v. Old Dominion Warehouse* (C.C.A.) 10 F. (2d) 736. The contention of the plaintiff in error finds support in *Murby v. United States* (C.C.A.) 293 F. 849, but that decision was materially modified, if not entirely overruled, in *Hurlay v. United States*, 300 F. 75, 78, where the same court said:

"The unauthorized and illegal act of the officer in destroying the fermenting mass in the boilers did not render his testimony as to his acts in the service of the warrant with which he was armed incompetent, nor render the search and seizure of the beer and equipment for its manufacture unlawful, and in violation of the defendant's constitutional rights, so that they would not be competent evidence'."

Therefore, it appears by the more recent and better reasoned cases that the requirement of inventory and receipt is directory and not mandatory and does not, therefore, invalidate evidence obtained in an otherwise legal search and seizure.

September 2, 1954.—054-214.

MUNICIPAL POLICE OFFICERS—SEARCH AND SEIZURES—LEGALITY

STATEMENT AND QUESTIONS: "A municipal police officer approaches a residence and states to the owner or legal occupant of residence that he has information that they are dealing in illegal whiskies, namely moonshine, and asks permission to search residence, permission is granted."

"Question 1. Is a search of a private residence legal when permission is obtained from the owner or legal occupant of residence?"

"Question 2. If while conducting this search, gambling paraphernalia or stolen merchandise is found, would the search and seizure be legal in as much as permission was given only for search of illegal whiskies?"

To: *Honorable J. R. Beach, Lt. of Detectives, City of Orlando, Orlando, Florida:*

There is no question but that a person can waive his rights guaranteed to him by the constitution if he so chooses. The Supreme Court of Florida held in the case of *Carlton v. State*, 111

Fla. 777, 149 So. 767, that a search of the defendant's dwelling house at the time of his arrest with the consent of the defendant and his wife was not unlawful, and further held that another search on the following day with only the consent of the wife was not unlawful. The legality of the second search evidently was upheld to some extent at least because it was done in an orderly manner and was nothing more than what was done the previous day with the consent of the defendant.

As to question two it must be assumed that the searching officer is legally on the premises, that is to say, he has been given permission and is searching with the consent of the owner or person having custody and control of the dwelling house. If that be true, then he is legally on the premises just as much as if he had a search warrant authorizing the search of the entire dwelling house.

Only unreasonable searches and seizures are condemned by the State and Federal Constitution, and the test of reasonableness by which the constitutional permissibility of a search and seizure is determinable cannot be stated in rigid and absolute terms. Each case is to be decided on its own facts and circumstances, and in a case where the owner or person in charge or control of a dwelling house gives permission to search such dwelling house for moonshine whiskey, the officer is legally on the premises, and if the search is conducted in a reasonable manner and is otherwise reasonable, gambling paraphernalia or stolen merchandise, if found in and upon the premises where under normal conditions moonshine whiskey would be stored or hidden, would be admissible against the accused on the trial of the case for the violation of such laws. *Harris v. U.S.*, 331 U.S. 145, 91 L. Ed 1399.

The manner in which the gambling paraphernalia or stolen merchandise is found would have some bearing upon the seizure however, because normally a person looking and searching for moonshine whiskey would not look, for example, between the pages of a book, but Cuba or bolita tickets could well be hidden between such pages, and if that be the case, such evidence would not be admissible. However, normally and generally, under the authority of *Harris v. U.S.*, supra, the seizure of gambling paraphernalia and stolen merchandise under the above circumstances would be admissible and the search would be legal.

INQUESTS OF THE DEAD

August 4, 1953.—053-183.

JUSTICES OF PEACE—OTHER CORONERS—DEAD BODIES—
AUTOPSY—AUTHORITY TO ORDER—§936.11, F. S.
& CH. 28019, ACTS 1953

Question: May a justice of the peace, or other coroner, order an autopsy when a death apparently occurred from a natural cause or from an accident and when it is in the interest of the public welfare to determine the cause of death?

To: *Honorable Murray Goodman, Attorney at Law, Miami Beach, Florida:*

Chapter 936, F.S., deals with inquests of the dead and names the justices of the peace of the several counties as coroners. A county judge is also authorized to act as a coroner in case the appropriate justice of the peace shall for any reason be unable to hold an inquest. Inquests of the dead are required to be held in the circumstances enumerated in §936.02 F.S. It will be observed that an inquest can be held when death apparently occurred from a criminal act, or when there are grounds for suspecting some sort of foul play, or in the other situations referred to in §936.02.

When a duly impanelled coroner's jury comes to the conclusion after examining a body that it is absolutely necessary, it may request the coroner to summons a physician to assist them in the examination. The physician may then perform a dissection of the body if he can not determine the cause of death from an external examination.

Incidentally, and by way of information, I call attention to a law passed by the recent session of the Florida Legislature which provides that either the state attorney or the county solicitor "may, in his discretion, have autopsies performed... whenever in his opinion such autopsies are necessary in order to ascertain whether death resulted from a criminal act or as the result of criminal negligence." Apparently, this action may be taken even when the coroner has not seen fit to request authority to conduct an inquest. But it can only be performed upon the order of the named official where it is *necessary* to determine whether the death occurred through some criminal act. (See Ch. 28019, Laws of 1953).

Although there is no objection to having a private autopsy performed when the person having the right of sepulture consents, there is no authority for a coroner, a state attorney or a county solicitor to order an autopsy except under the circumstances indicated in the statutes cited herein.

On the basis of the foregoing considerations it is my opinion that your question should be answered as follows:

A coroner's jury, a state attorney or a county solicitor can call for an autopsy (a dissection of a body to determine the cause of the death) only when such is necessary to determine whether the death was caused by, or was the result of, a criminal act or when such is required by law for other reasons.

PROCEEDINGS IN COURTS OF COUNTY JUDGES AND JUSTICES OF THE PEACE

October 27, 1953.—053-295.

**CONSTABLES—FINE AND CASH BONDS—COLLECTIONS—
DEPOSITS IN FINE AND FORFEITURE FUND**

QUESTIONS: 1. "Under the conditions set out in §937.13,

F.S., may a constable, acting as executive officer of the court, collect the amounts adjudged against the defendant?

2. "When a constable properly takes a cash appearance bond under conditions discussed in your opinion on page 597, Report for 1947-48, question 1, and the bond is estreated (reference is made to the opinion on page 596 of the same report), should the amount of the bond be deposited in the fine and forfeiture fund by the county judge or justice of the peace, or by the constable?

3. "If a constable collects and deposits to the fine and forfeiture fund moneys which are required to be deposited therein, but which the constable did not have the authority to collect or so deposit, is he entitled to the five per cent commission prescribed by §30.23, F.S.?"

To: Honorable Bryan Willis, State Auditor:

In regard to your first question, there are two opinions of my predecessor in office (Pages 45 and 55, Biennial Report of the Attorney General, 1941-1942) which concern this subject. One of these opinions provides as follows: "Fines imposed by justices of the peace and county judges courts must be received by the justice of the peace or county judge, if paid before commitment and by the sheriff after commitment (§8444, C.G.L.). Therefore, constables have no power to take and receive voluntary payments of fines. However, where sentences impose fines, executions may be issued thereon as on judgments in civil actions and the constable, being co-executive officer, may execute such process if it is placed in his hands but not otherwise (§263, Ch. 19554, Acts of 1939)." The laws referred to above are now respectively recited as §§937.13 and 922.02, F.S.

The other opinion which pertains to the matter raised by your first question states "...as to the acceptance of the payment of fines by constables, I find no provision of law authorizing a constable to accept the payment of fines at any time."

As to your second question, it is provided in §903.16 that "when the defendant has been admitted to bail he, or another in his behalf may deposit with an official authorized to take bail a sum of money ... equal ... to the amount mentioned in the order admitting the defendant to bail, together with his personal undertaking, and an undertaking of such other person, if the money or bonds are deposited by another ..."

A constable can take and approve a bail bond when the amount thereof is properly endorsed on the back of the warrant which authorizes him to make an arrest. Under §37.18, F.S., a constable must pay over any money collected by him to the person who is entitled to receive it on demand. If he does not pay over such money on demand, he is subject to penalty.

The estreature of a bond is essentially the function of the court to which the defendant was bound to appear, rather than the function of an executive officer of that court. Although a constable may be holding the amount of a cash bond, until it is demanded by the court, it is held in trust for the state and it is the duty of

the court, upon entering a judgment of forfeiture, to demand the amount of the bond from the constable. Once it is received by the court it should be deposited by it in the county fine and forfeiture fund in accordance with §9, Art. XVI, Florida Constitution.

In regard to your third question it is not evident that a sheriff or a constable, who receives the same fees for like services, is entitled to any compensation for the isolated act of making a deposit in the county fine and forfeiture fund. However, if a constable lawfully collects a cash sum, he will be entitled to receive, as compensation for such service, 5% of the amount collected, if that amount becomes due to the county fine and forfeiture fund, and if the constable had the authority to collect the amount.

In consideration of the foregoing it is my opinion that your questions should be answered as follows:

1. A constable has no authority to collect or accept payment of fines imposed under the conditions referred to in §937.13, F.S.

2. If a constable has properly taken a cash appearance bond, he may retain the amount collected subject to the order of the court to which the defendant was bound to appear; but if the defendant fails to appear and the bond is forfeited, the court, if it has not already done so, must demand the money from the constable and, after the time for the discharge of the forfeiture has elapsed, the court must deposit the money in the fine and forfeiture fund.

3. If a constable collects money payable to the county fine and forfeiture fund without any authority to make such collection, he has not performed a service for which the law grants him a fee and he can not receive the specified 5% commission.

UNIFORM INTERSTATE EXTRADITION

June 19, 1953.—053-127.

FLORIDA PAROLE COMMISSION—AUTHORITY—ARREST OF DELINQUENT PAROLEE UNDER ITS SUPERVISION IN ANOTHER STATE—TERMS OF PAROLE COMPACT

QUESTION: Does the Florida Parole Commission have the authority to cause the arrest of a delinquent parolee, under its supervision, when such parolee is on parole in another state and is under the Florida Parole Commission's supervision under the terms of the Interstate Parole and Probation Compact?

To: Honorable Francis R. Bridges, Florida Parole Commission:

There seems little doubt but that the intent of the Interstate Compact, §949.07, F.S., intends that the supervising state shall exercise such rights and supervision over parolees of other states as is necessary to carry out the provisions of the section. However, in the absence of the promulgation of rules and regulations covering this specific point, pursuant to §949.07, Subsection (1) (b)-(5), there would seem to be some doubt whether the Florida Parole Commission could cause the arrest of a parolee for a breach of

his parole not amounting to a crime in Florida, on the basis of the Interstate Compact law.

I call your attention to the provisions of §941.13, which provides as follows:

"941.13 Arrest prior to requisition.—Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, and except in cases arising under §941.06 with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under §941.06, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant." (Emphasis supplied)

Your attention is further called to the provisions of §941.15, F.S. and §941.17, F.S., respectively, which provide as follows:

"941.15 Commitment to await requisition; bail.—If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under §941.06 that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged." (Emphasis supplied.)

"941.17 Extension of time of commitment adjournment.—If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate judge may again

take bail for his appearance and surrender, as provided in §941.16, but within a period of not to exceed sixty days after the date of such new bond." (Emphasis supplied)

Under the above sections, a member of the Parole Commission or any other credible person may cause the arrest of such a parolee by making the affidavit above referred to. It will be noted that this includes an affidavit from a credible citizen of the sending state as well as a citizen of Florida.

My predecessor in office, giving an opinion on this same subject, was of the opinion that if such a parolee was arrested under §941.13, F.S., the sending state would have no alternative but to extradite such parolee if it was to get him back. I find myself in disagreement with this. I am of the opinion that the sending state has the option of either extraditing such a parolee or of sending an agent for such parolee under the terms of the Parole Compact.

Because of the foregoing, I have concluded that your question should be answered in the affirmative.

As to your proposed Form D attached to your letter, I am of the opinion that the same would be insufficient, as the basis for the arrest of such parolee. I suggest that a form affidavit be used, covering substantially the same matters covered in your proposed Form D with the following additions thereto: (1) the crime for which the parolee was convicted; (2) the term of his parole allegedly violated; and (3) a space for a concise and simple statement of the facts constituting such violation.

WITNESSES

December 16, 1954.—054-259.

ATTORNEYS—INTERVIEW WITH WITNESS HELD IN CUSTODY OF PUBLIC INSTITUTIONS—LEGALITY

QUESTION: Does a defense attorney have the absolute right in behalf of the defendant to require a private interview with a witness who is being held in custody in a public institution?

To: *Honorable Richard H. Cooper, County Solicitor, Orange County, Orlando, Florida:*

This matter has been considered to some extent by the Supreme Court of Florida in the cases of *Hodgins v. State*, 139 Fla. 226, 190 So. 875, 124 A.L.R. 450, and *Baker v. State*, 47 So. 2d 728. The matter is also fully explored in an annotation in 124 A.L.R. 454.

I believe that the annotation in A. L. R. mentioned above clearly sets out the law applicable to your question. I take the liberty of quoting at length from that annotation:

"It may be said generally that a defendant or his counsel, *has ordinarily a right to confer with a witness who is being held in custody in a public institution, and whose testimony is sought in defendant's behalf.* The courts, however, have not clearly announced whether the inter-

view may be in private, or whether it must take place in the presence of the witness' custodian.

On the other hand, *the right of a defendant, or his counsel, to interview a witness for the state, who is in custody in a public institution, is generally considered to be in the discretion of the court.* The terms and conditions of such an interview may be fixed by the court, and it has been held that the courts may sometimes, under the particular facts involved, properly refuse to permit any interview with a state's witness in custody in a public institution, either privately or in the presence of the witness' custodian." (Emphasis supplied)

I answer your question in the negative for it is my opinion that the decisions do hold that a defendant has no absolute right to have his counsel hold a private interview with a witness who is in jail particularly where a state witness is involved. Such an interview may be subject to such terms and conditions as are necessary. These terms and conditions are within the discretion of a court to determine upon application for writ of habeas corpus ad testificandum. It would seem that an alternative method of determining the terms and conditions of the interview would be by the presenting of a motion by defendant's counsel to the trial court for an order granting permission to confer with the detained witness. That court could then determine whether or not the interview should be allowed and the terms and conditions thereof if allowed. This alternative would obviously be more expeditious because it would permit all matters to be considered on one appeal in the event the defendant feels he is aggrieved.

CHAPTER XLVI
CORRECTIONAL SYSTEM
STATE PRISON FARM

November 25, 1953.—053-316.

GAIN TIME—PRISONERS—JAIL SENTENCE—
AM. §954.06, F.S., 1953 APPLICABLE

QUESTION: Does the gain time law (§954.06, F.S., as amended by Ch. 28300, Acts of 1953) apply to a prisoner serving a jail sentence which is made mandatory by statute?

To: Honorable John A. Madigan, Jr., Attorney, Florida Sheriffs Association, TALLAHASSEE:

By the term "jail sentence which is made mandatory by statute" I assume that you refer to a sentence to a term of imprisonment in the county jail which is the minimum term allowed by the governing statute.

Section 954.06, F.S., as amended by Ch. 28300, Acts of 1953, provides that "Commutation of time for good conduct *shall* be granted. . . and the following deductions *shall* be made from the term of sentence when no charge of misconduct has been sustained against a prisoner, viz.:" (here follows a schedule of the deductions to be made for good conduct). This statutory provision makes no distinction between sentences made mandatory by statute and sentences permitted, but not made mandatory, by statute and it unequivocally bestows upon a prisoner the right to gain time for good conduct without regard to whether the sentence be mandatorily required by statute or not. Therefore, it is my opinion that your question is properly answered in the affirmative.

JAILS AND JAILERS

April 5, 1954.—054-78.

PRISONERS—MAIL—CENSORSHIP BY JAIL AUTHORITIES

STATEMENT OF FACTS: A prisoner is charged with the crime of first degree murder, and while incarcerated in the county jail on such charge, writes a letter to his family in which he confesses the crime, although he had previously pled not guilty to the charge. In accordance with the rules of the jail, all outgoing mail is censored by the jailer, and in the instant case, the prisoner's letter had been turned over to the jailer for mailing, stamped and unsealed, in accordance with the regulations. t.

QUESTION I: May outgoing mail of prisoners properly be subjected to censorship by jail authorities?

QUESTION II: Assuming that the answer to Question I is in the affirmative, does the jailer or the sheriff have the right to withhold such letter from mailing, and to turn over the letter to the prosecuting authorities?

QUESTION III: Assuming the answers to Questions I and II are in the affirmative, may the letter described above be used in evidence against said prisoner in a prosecution for the alleged crime?

To: Honorable John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee, Florida:

AS TO QUESTION I: In 72 C.J.S., 876, Prisoners, §18-C, it is pointed out that outgoing letters from prisoners may be censored by prison authorities and more fully says:

"The prison authorities may properly regulate and control the mail of a prisoner, and the withholding of mail from a prisoner has been held purely a matter of prison regulation within the administrative discretion of the warden and not within the jurisdiction of the court. Furthermore, a requirement that outgoing letters from prisoners be censored by the prison authorities has been held valid, and the prison authorities may, in a proper case, refuse a prisoner permission to mail a letter, without interference by the court * * *"

In *Gerrish v. State of Maine*, 89 Fed. Supp. 244, the District Court said:

"Requirements that outgoing letters from prisoners be censored by prison authorities is a proper and long-established rule in State as well as Federal prisons."

In *Adams v. Ellis, et al.*, 197 Fed. 2d 483, wherein the complainant challenged the right of prison officials to impose censorship upon the prisoners' mail, the court said:

"It is well recognized that prison authorities have the right of censorship of prisoners' mail. As said in *Price v. Johnson*, 334 U.S. 266, 285, 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a restriction justified by the considerations underlying our penal system'."

And in *Reilly v. Hiatt*, 63 Fed. Supp. 477, wherein the petitioner, a penitentiary inmate, requested the court to order the warden to mail certain letters immediately, the court said:

"(1) This is in effect a request for an order abolishing censorship of mail of prisoners. The withholding of mail is purely a matter of prison regulation within the administrative discretion of the warden of the penitentiary and not within the jurisdiction of this Court. *United States v. Thompson*, D.C., 56 F. Supp. 683."

The facts in your case set out a lawful incarceration. Censorship was considered necessary, and finding no constitutional or

statutory provision in Florida which forbids such, and in view of the authorities here referred to, it is my opinion that the above-stated question is properly answered in the affirmative.

AS TO QUESTION II: In 22 C.J.S. 995, 996, §650, Articles Taken from Accused, appears the following:

“* * * Nor is the constitutional guaranty violated by the admission of incriminating evidence taken from the person of accused or his immediate possession at the time of his arrest, where the arrest and the accompanying search and seizure were legal. Likewise, the constitutional privilege is no bar to the admission of such articles disclosed through accident or inadvertence, and, a fortiori, of papers and other articles voluntarily produced by accused. * * *”

And in 20 Am. Jur. 362, §401, Articles Taken From Accused:

“* * * So, it may be taken to be well settled that a person in custody on a criminal charge may be subjected to a personal search and examination against his will, in order to discover upon him evidence of his criminality. * * *”

In *Hyde v. State*, 26 S.E. 2d 744, wherein a letter and envelope were taken from the defendant and the letter confessed the crime for which he was being tried, the Georgia court held that such was admissible, saying:

“* * * The objection that they were obtained without authority and tended to require the defendant to give testimony against himself is without merit. At the time the search was made by Crow the defendant was in legal custody. He was being returned to the jail from the courthouse where the trial had consumed the day. The search was in perfect harmony with the diligence and caution of those charged with the custody of prisoners for reasons of safety. * * *”

No Florida cases were found that have dealt with the factual situation presented by your letter. However, in 53 A.L.R. 1485, the annotation there discusses two cases which are very nearly the same as your case. In the one case the sheriff intercepted the letter which contained evidence almost equivalent to a confession and the Pennsylvania Court said that the interception was proper. In the other case the jailer intercepted the letter and the West Virginia Court held that such was proper and that the letter was admissible even though it were incriminating.

Therefore, it is my opinion that Question II should be answered in the affirmative. The prisoner voluntarily produced the letter unsealed for censorship knowing what it would reveal and any objection he might now voice with reference to said letter is without merit. His present position is the result of his own affirmative and voluntary action.

AS TO QUESTION III: In 22 C.J.S. 1432, Confessions, §817-D(2), the following language appears:

"Indeed, in the absence of contrary statutes, a confession otherwise shown to have been voluntary is not rendered inadmissible by the fact that the accused was under arrest or in custody at the time."

The courts of Florida, in numerous cases, have held that extrajudicial confessions by the accused are admissible if voluntarily made and are not rendered inadmissible because the accused was not warned as to his rights and that the same could be used against him. See: *McDonald v. State*, 70 So. 24; *Stoutamire v. State*, 183 So. 316.

The confession set out in the letter was voluntarily and freely given and lawfully received. Therefore, Question III is properly answered in the affirmative.

April 23, 1954.

Honorable John A. Madigan, Jr.
Attorney, Florida Sheriffs Association
Suite 221, Center Building
Tallahassee, Florida

Dear Mr. Madigan:

In my opinion to you of April 5, 1954, concerning censorship of prisoners' mail, which has been enumerated as Attorney General Opinion 054-78, I should like to insert the following at the end of the last paragraph.

In 79 C.J.S. 798, Section 30, the following appears:

"The constitutional guaranty does not apply to the interception of a prisoner's mail by the jailor or warden, nor will it prohibit the turning over of such a letter to the prosecuting attorney, for use against the convict, by the warden who had a right to peruse the convict's mail."

In the case of *Stroud v. United States*, Kan., 40 S.Ct. 50, 251 U.S. 15, 64 L.Ed. 103, rehearing denied 40 S.Ct. 176, 251 U.S. 380, 64 L.Ed. 317, cited in the footnote to the above quotation from C.J.S., all three of the questions in your letter of March 17, 1954, are discussed. My affirmative answers to your questions are all borne out by the following language in the *Stroud* case, *supra*, at page 111 of the Lawyers Edition:

"Certain letters were offered in evidence at the trial containing expressions tending to establish the guilt of the accused. These letters were written by him after the homicide and while he was an inmate of the penitentiary at Leavenworth. They were voluntarily written, and under the practice and discipline of the prison were turned over ultimately to the warden, who furnished them to the district attorney. It appears that at the former trial, as well as the one which resulted in the conviction now under consideration, application was made for a return of these letters upon the ground that their seizure and use brought them within principles laid down in *Weeks v. United States*,

232 U.S. 383, 58 L.ed. 652, L.R.A. 1915B, 834, 34 Sup.Ct. Rep. 341, Ann.Cas. 1915C, 117, and kindred cases. But we are unable to discover any application of the principles laid down in those cases to the facts now before us. In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights."

The case of *State v. Booker*, 69 S.E. 295, 68 W.Va. 8, also cited in the footnote to the above quotation from C.J.S., was covered in the discussion of the note in 53 A.L.R. 1485, in said Attorney General Opinion 054-78.

1954 CONSTITUTIONAL AMENDMENTS

The 1953 Legislative Session provided that seven proposed amendments to the Florida Constitution be submitted to the electors at the general election in 1954. Of these proposed amendments six were adopted and one was defeated. So far as I am advised there have been no court decisions affecting these amendments since their adoption. The language of the new amendments is set out below.

LEGISLATIVE DEPARTMENT

Article III

Section 2. Regular and extra sessions.—The regular sessions of the Legislature shall be held biennially, commencing on the first Tuesday after the first Monday in April, A. D. 1887, and on the corresponding day of every second year thereafter, but the Governor may convene the same in extra session by his proclamation. Regular sessions of the Legislature may extend to sixty days, but no special session convened by the Governor shall exceed twenty days. The regular sixty-day biennial session of the Legislature may, by a three-fifths vote of the membership of both houses, be extended not exceeding a total of thirty days which need not be consecutive. Recesses in such extended session shall be taken only by joint action of both houses. No extended session may last beyond September 1st following the regular biennial session. During such extended session, no additional proposed legislation shall be introduced unless consent is first obtained by a two-thirds vote of the members of the House into which it is sought to be introduced.

Section 4. Legislators, salaries, etc.—Senators and members of the House of Representatives shall be duly qualified electors in the respective counties and districts for which they were chosen. The compensation of legislators shall be twelve hundred (\$1200.00) dollars each year and shall be paid in monthly installments of one hundred (\$100.00) dollars each. During the time the legislature is in session each legislator shall receive per diem and travel expenses as provided by law, but such may not exceed the allowances for such expenses provided for other state officials under general law.

Article III

Section 28. Executive approval of acts; veto; overriding veto.—Every bill that may have passed the Legislature shall, before becoming a law, be presented to the Governor; if he approved it he shall sign it, but if not he shall return it with his objections to the House in which it originated, which House shall cause such objections to be entered upon its Journal, and proceed to reconsider it; if, after such reconsideration, it shall pass both Houses by a two-thirds vote of members present, which vote shall be entered on the Journal of each House, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the Governor, (Sunday ex-

cepted) the same shall be a law, in like manner as if he had signed it. If the Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor within twenty (20) days after the adjournment, shall file such bill with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law.

JUDICIAL DEPARTMENT

Article V

Section 16b. When and as the business of the office of the County Judge requires, in any county having a population of more than 125,000 according to the last official census of Florida, the Legislature may provide for one or more additional County Judges who shall be elected by the qualified electors of such county at the time and places of voting for other county officers and such additional County Judge or Judges, shall hold said office for four years and said Judge's or Judges' compensation shall be provided for by law, and he or they shall have and exercise all the powers and perform all the duties that are or may be provided or prescribed by the Constitution or Statutes for County Judges, and all laws relating to the County Judge shall apply to said additional County Judge or Judges. Provided, however, that any law enacted by the Legislature providing for additional county judges shall require a referendum thereon, and such law shall not become effective until it is ratified by a majority of the voters of the County affected who participate in said election.

Article V

Section 39A. From and after the adoption of this Amendment, there shall be a Judge of the Court of Record in and for Escambia County, Florida, in addition to the Judge of said Court already provided. Said Judge shall be elected, at the General Election next succeeding the coming into effect of this Amendment, and shall hold office for six years and receive the same salary and allowances for expenses as is now provided for the Judge of the Court of Record in and for Escambia County, Florida. He shall have all powers and perform all duties and possess all qualifications that are or may be provided or prescribed by the Constitution or by statute for the Judge of the Court of Record in and for Escambia County, Florida, and all statutes concerning said Judge shall apply to him. Provided, however, that if there be a Commissioner of the Court of Record in and for Escambia County, Florida, he shall upon the coming into effect of this Amendment become such additional Judge, and shall be commissioned by the Governor as such, to hold office until his successor is duly elected and qualified.

4.

(2) The Legislature may from time to time and as the business of the Court of Record in and for Escambia County, Florida, requires, provide for the appointment for one or more additional

Judges of said Court. Each such additional Judge shall be elected and hold office for six years and shall receive the same salary and allowances for expense as other Judges of the Court of Record in and for Escambia County, Florida. They shall have all powers and perform all duties and possess all qualifications that are or may be provided or prescribed by the Constitution or by statute for the Judge of the Court of Record in and for Escambia County, Florida, and all statutes concerning said Judge shall apply to them.

COUNTIES AND CITIES

Article VIII

Section 10A. From and after January 1, 1956, the county tax assessor in the County of Monroe, State of Florida, shall assess all property for all state, county, school and municipal taxes to be levied in the county by the state, county, county school board, school district, special tax school districts, port districts, drainage districts, and any other taxing districts, and municipalities of the county.

(2) The Legislature shall at the legislative session in 1955 and from time to time thereafter, enact laws specifying the powers, functions, duties and compensation of the county tax assessor, designated in the first paragraph of this section, and shall likewise provide by law for the extension on the assessment roll of the county tax assessor of all taxes levied by the state, county, county school board, school districts, special tax school districts, port districts, drainage districts, and any other taxing districts and municipalities whose taxes may be assessed by the county tax assessor pursuant to the first paragraph of this section.

Article VIII

Section 22. Authority of the Legislature as to assessment and collection of municipal taxes.—The Legislature may, by general, special or local act provide for the assessment of the taxes of any municipality by the County Tax Assessor of the county wherein such municipality is located and the collection thereof by the County Tax Collector of such county; provided that no such act, except the provisions thereof for a referendum election, may become effective in any municipality until approved by a majority vote of the electors qualified to vote in such municipality, voting at an election called for such purpose, which election may be held separately or with any other election. Any such act shall provide for reasonable compensation for the County Tax Assessor and County Tax Collector for such additional duties to be paid by the municipality for which such duties are performed.

1953 ENACTMENTS OF GENERAL INTEREST

Sections 12.01-12.09 or chapter 28292, establishes Florida commission of interstate cooperation.

Section 15.031 or chapter 28126, designates the sabal palmetto palm as state tree.

Section 36.01 or chapter 28080, expands jurisdiction of county judge to all misdemeanors committed in county.

Section 43.15 or chapter 28062, creates judicial council and prescribes duties.

Section 59.281 or chapter 28087, authorizes circuit judge to forward original files to supreme court as appellate record.

Section 65.18 or chapter 28187, provides for enforcement of orders and decrees for alimony, support and maintenance, and suit money.

Section 72.21 or chapter 28044, requires all recommendations and statement of facts filed by child placing agency or welfare board to be served on petitioner in adoption proceedings, in same manner as pleadings.

Section 74.141 or chapter 28007, extends eminent domain law to municipalities, rural electric and telephone co-operative or public utility corporations for purpose of securing rights-of-way for transmission lines only and provides that cause be tried not later than 30 days after return day.

Section 84.05 or chapter 28243, provides for surety bonds on alternative method of payment for performance under contract under mechanics' lien law.

Section 84.15 or chapter 28244, provides for filing single claims of liens on projects under same contract.

Sections 88.01-88.12 or chapter 27996, provides uniform reciprocal procedure to compel the support of dependents within and without the state.

Section 121.044 or chapter 27992, authorizes credit on retirement of seasonal employment of state officers and employees.

Section 121.14 or chapter 28250, exempts certain services of physicians from prohibition of state employment after retirement under state system.

Section 121.19 or chapter 28160, authorizes blind vending stand operators to participate in state retirement system.

Section 165.191 or chapter 28000, authorizes municipalities to adopt by reference of any published health, plumbing, building, etc., code and provides procedure.

Section 165.92 or chapter 28001, authorizes codification of municipal ordinances and validates codification heretofore made.

Sections 185.01-185.33 or chapter 28230, provides municipal police officers retirement system.

Section 192.061 or chapter 28307, exempts certain property of non-profit corporations from taxation and cancels 1952, 1953 taxes.

Section 192.16 or chapter 28105, provides penalty for giving false information in homestead exemption claims.

Section 192.161 or chapter 28199, relates to homestead exemption claims for persons in armed forces.

Section 192.381 or chapter 28317, provides for sale of Murphy Act lands to former owner.

Sections 192.61, 194.63 or chapter 28262, defines riparian rights relating to submerged bottoms and restores said rights to original status.

Section 204.02 or chapter 28028, provides annual license tax of \$10.00 for each retail store located and operated in state.

Section 205.411 or chapter 28289, requires county permit before issuance of occupational license for fortune telling and like pursuits.

Sections 208.47-208.63 or chapter 28098, provides for refund of motor fuel tax on fuels used solely for agricultural and commercial fishing purposes.

Sections 216.02, 216.10, 216.11, 216.16 and 216.17 or chapter 27994, requires separate sections of various state department budgets for operational and capital outlay expenditures and prohibits transfer of allotted funds.

Section 231.09 or chapter 28055, exempts from certain types of instruction in schools, pupils whose parents object to such instruction on religious grounds.

Section 232.30 or chapter 28054, exempts from examination of school children by state board of health any child whose parents object thereto on religious grounds.

Section 236.07 or chapter 28212, provides for continuance certain teachers certificates.

Section 241.411 or chapter 27995, changes name of Florida A & M College to Florida A & M University.

Section 241.472 or chapter 27998, provides appropriation of \$5,000,000.00 for medical and nursing school at University of Florida.

Sections 245.01-245.16 or chapter 28163, establishes state anatomical board and prescribes duties and powers.

Sections 287.01-287.10 or chapter 28056, establishes a state purchasing council.

Section 295.01 or chapter 28195, authorizes educational benefits for orphans of Korean war veterans.

Section 295.13 or chapter 28204, removes disability of nonage for veterans and minor spouses for obtaining benefits of servicemen's readjustment act.

Section 320.10 or chapter 28314, exempts motor vehicles owned and operated by boys clubs, American Legion and children's Bible mission from license law.

Section 322.221 or chapter 28120, requires examination and re-examination of certain persons for drivers licenses.

Sections 340.01-340.33 or chapter 28128, creates state turnpike authority and provides powers, duties and authority.

Sections 370.01-370.20 or chapter 28145, revises law relating to the conservation of natural resources in salt waters of state.

Sections 370.051-370.055 or chapter 28253, protects and controls artesian waters.

Sections 372.86-372.92 or chapter 28263, regulates possession and exhibit of poisonous or venomous reptiles.

Section 381.301 or chapter 28040, requires reports of communicable diseases to state board of health.

Sections 389.13-389.21 or chapter 28131, provides state participation and financial aid to counties and mosquito control districts in control of mosquitoes, sand flies and other arthropods.

Sections 396.011-396.121 or chapter 28134, authorizes formulation and operation of program for prevention, care, treatment and rehabilitation of alcoholics.

Sections 400.001, 400.01-400.16 or chapter 28140, provides for licensing and regulating nursing homes.

Section 409.16 or chapter 28138, increases amount of old age assistance allowable.

Section 409.19 or chapter 28257, relates to district welfare board hearings and appeals to the state welfare board.

Section 409.38, or chapter 27993, provides for welfare list to be filed monthly with clerk of circuit court.

Sections 409.39-409.43 or chapter 28161, provides for aid to permanently and totally disabled needy persons.

Sections 450.011-450.171 or chapter 28240, relates to child labor, regarding the minimum age at which minors may work.

Sections 487.01-487.12 or chapter 28214, regulates manufacture, sale, etc., of pesticides (and devices).

Section 488.01-488.07 or chapter 28142, regulates licensing of commercial driving schools.

Section 516.17 or chapter 28011, deletes provision allowing a small loan licensee to collect, from the borrower's employer, 10% of the borrower's wages, salary, or other compensation.

Section 542.12 or chapter 28048, invalidates contracts in restraint of trade.

Section 550.16 or chapter 28058, provides additional tax on dog race tracks and prescribes distribution thereof.

Section 552.011-552.071 or chapter 28144, regulates manufacture, use and distribution of explosives.

Sections 556.01-556.09 or chapter 28173, regulates sale and renovation of bedding.

Section 585.34 or chapter 28255, relates to inspection of meat and meat products.

Sections 585.48-585.59 or chapter 28313, prohibits feeding uncooked garbage to animals and prescribes method of processing said garbage.

Sections 586.01-586.09 or chapter 28167, provides for inspection and certification of honey.

Sections 608.01-608.60 or chapter 28170, revises and consolidates corporation laws.

Section 627.43 or chapter 28067, requires insurers to keep on file a credit and character report of accident and health insurance agents.

Section 631.16 or chapter 28189, regulates admission of alien fire and casualty insurance companies.

Sections 639.06-639.17 or chapter 28211, regulates contracts for burial.

Sections 651.01-651.12 or chapter 28190, regulates agreements for maintenance or personal care for a period of years or for life

Sections 658.01-658.11, 659.01-659.58, 660.01-660.14 and 661.01-661.44 or chapter 28016, creates department of banking and provides for organization, consolidation, merger, conversion, dissolution and liquidation of banks and trust companies.

Section 665.071 or chapter 28308, prohibits branch establishments of building and loan associations.

Section 689.19 or chapter 28208, creates presumption that persons are the same when signatures vary on instruments affecting title to real property.

Section 733.211 or chapter 28180, prescribes limitation of action on claims against estates.

Section 741.07 or chapter 28104, authorizes certain persons in society of Quakers or Friends to solemnize marriages and validating such prior marriages.

Section 782.06 or chapter 28274, defines wilful tampering with aircraft mechanism as first degree murder.

Section 838.02 or chapter 28052, prohibits soliciting or accepting bribes by officers and provides penalties.

Section 838.12 or chapter 28024, prohibits giving, soliciting or accepting bribes and other considerations in connection with athletic contests.

Section 849.051 or chapter 28057, provides possession of federal wagering occupational tax stamp prima facie evidence of violation of state gambling laws.

Sections 876.22-876.31 or chapter 28221, protects against subversive activities by making it a crime to commit or advocate acts intended to effect the overthrow of the federal or state government or constitution.

Section 903.111 or chapter 28153, defines and provides for licensing professional bail bondsmen.

Section 932.57 or chapter 28019, authorizes state attorney or county solicitor to order autopsies to ascertain whether death resulted from criminal act or as a result of criminal negligence.

IMPORTANT COURT PROCEEDINGS AND DECISIONS

Attorneys—Admission to Practice

Fuller v. Watts, 74 So. 2d 676—Suit for declaratory decree for an interpretation of §454.031, F.S., insofar as it regulates admissions to the bar. The Court held that the legislature did not act unconstitutionally in fixing the arbitrary date of July 25, 1951, by which a student must have enrolled in an approved law school to be eligible for the diploma privilege; that the legislature has power to regulate admissions to the bar; and that the fixing of an arbitrary date did not impose an undue hardship or deny equal protection of the law to those not having enrolled by the date fixed.

Attorneys—Disbarment Proceedings

State v. Giblin, 73 So. 2d 851—Original proceeding in prohibition to prohibit a circuit court judge from taking jurisdiction of a proceeding to disbar relator from practice of law. Court held that Article XI of the Integration Rule of The Florida Bar adopted by the Court did not supplant existing remedies or procedure for disciplining attorneys but that it provides additional and supplementary procedure.

Commissions—Power to Regulate

Lee v. Delmar, 66 So. 2d 252—Suit by real estate salesman to determine legality of resolution of real estate commission; Supreme Court held that resolution of Real Estate Commission prohibiting real estate salesman from operating as part-time sales-

man is invalid as in excess of power granted by the legislature to the commission and as a deprivation of inalienable right to work and earn a living as provided by Florida Constitution, Declaration of Rights.

Corporations—Usury

Sodi, Inc. v. Salitan, 68 So. 882—In certiorari proceedings to review order of Circuit Court, the Florida Supreme Court held that the effect of the enactment of Chapter 28170, Acts of 1953, repealing statutes making defense of usury unavailable to corporations was to make the usury laws of this state applicable to artificial persons as well as individuals.

Courts—Inspection of Records

Petition of Kilgore, 65 So. 2d 30—Petition by representatives of the press suggesting that the Supreme Court treat requests from the governor under Section 13, Article IV of the Florida Constitution, including advisory opinions in response thereto, as public records subject to inspection by the press and the public as contemplated by §119.01, F.S. The Court, per curiam, held that the request for an advisory opinion of the Court by the governor may be withdrawn at any time, that while it is under consideration by the Court it is not subject to public inspection or inquiry; that it does not become a part of the public files of the Court until and unless the opinion which contains the request is delivered to the governor at which time it is filed with the clerk of the Supreme Court and is open to the public and press for inspection.

Criminal Law—Child Molester Law

Copeland v. State, —So. 2d ——The Supreme Court held that chapter 28158, Laws of 1953, amending the child molester law, violates section 16, Article III of the Florida Constitution in that: (1) it embraces eleven different crimes denounced by other state statutes; (2) it does not publish at length the statutes with reference to rape which it attempts to amend and (3) the title of the act is insufficient to give notice that one of the purposes of the act is to change the penalty for rape when the age of the female is fourteen years or under.

Criminal Law—Federal Gambling Stamp

Jefferson v. Sweat, —So. 2d ——In an appeal from a final judgment in a habeas corpus proceeding the Supreme Court speaking through Mr. Justice Mathews held unconstitutional Section 1 of Chapter 28057, Laws of 1953, as construed with Section 3 of said chapter, in that it would deprive a person of his liberty without due process and the equal protection of the law. The statute is an attempt to make the mere possession of an internal revenue wagering occupational stamp prima facie evidence of a violation of the gambling laws of Florida and sufficient evidence to convict without any proof of a violation of said laws.

Criminal Law—Medical Experts

McVeigh v. State, 73 So. 2d 694—In an appeal from a conviction for murder, the Supreme Court held that Sections 909.17 and 919.02, Florida Statutes, which provide for the appointment

by the court of medical experts to examine defendant as to his sanity at time offense was committed and examination of such experts by the court, do not violate provisions of State Constitution relative to separation of powers or require defendant to testify against himself or deprive defendant of due process of law or trial by jury.

Criminal Law—Searches and Seizures

Collins v. State, 65 So. 2d 61—In an appeal from a conviction by the circuit court of Marion county of promoting a lottery, the supreme court held that when it is impossible or impracticable to secure a search warrant preliminary to stopping a motorist and searching his car, that if such search is accomplished without a warrant the officer must be able to show that he had probable cause for his acts, or reasonable belief or trustworthy information that the car was engaged in transportation of contraband and adopted a rule embodying its former decisions stated in *Longo v. State* 26 So. 2d 818, *Brown v. State* 46 So. 2d 479, with that of the U. S. Supreme Court in *Husty v. U. S.* 51 S. Ct. 240, 282 U. S. 694, 75 L. Ed. 629.

Criminal Law—Searches and Seizures

In re Smith, 74 So. 2d 353—A hotel operator brought certiorari proceedings to quash an order of the hotel commission suspending petitioner's hotel license. The circuit court in Dade county denied a petition for certiorari, and petitioner appealed. The supreme court, through Justice Sebring, affirmed, holding that censurable conduct and language of the inspectors without search warrants did not make the entire inspection illegal nor render inadmissible all incriminating evidence disclosed by the inspection. The evidence was held to be sufficient to sustain the suspension of the hotel license, where it was shown that rooms contained paraphernalia commonly used in bookmaking operations. The authority of chapter 511, Florida Statutes, was deemed sufficient to permit the inspection of the premises by the two deputy sheriffs and four investigators from the Attorney General's office, two of whom were deputy hotel commissioners. Justice Terrell concurred specially to condemn the means employed by the law enforcement officers to accomplish the end result. Associate Justice Dayton, dissented vigorously on the grounds that although the evidence was sufficient to create a strong suspicion of gambling activity on the searched, it was not evidence which created a suspicion that was "substantial evidence" of gambling. He reasoned that the act was an unreasonable and illegal search and seizure, accompanied by a physical assault and verbal abuse, thus violative of section 22 of the Declaration of Rights of the Florida Constitution, and of the Fourth Amendment to the U. S. Constitution.

Criminal Law—Self-incrimination

State ex rel Feldman v. Kelly, —So. 2d ——On appeals from several orders entered in habeas corpus proceedings wherein petitioners were adjudged in contempt and committed to jail in Dade county, the Supreme Court in a per curiam opinion held that a person being investigated by a grand jury for communistic activities may claim protection under section 13 of the Declara-

tion of Rights of the Florida Constitution and refuse to answer questions which he fears would incriminate him under sections 876.01, 876.02(4) (5) and 876.03, Florida Statutes. However, the court held that petitioners were not entitled to protection under the Fifth Amendment to the Federal Constitution since it applies only to Federal Courts and is not a limitation on the power of the states.

Deeds—Reverter Clause

Biltmore Village v. Royal, 71 So. 2d 727—In Suit to quiet title against possibility of reverter, Supreme Court held statute (§689.18 F.S.) which cancelled all reverter provisions in plats or deeds conveying any interest in real estate which have been in effect for more than 21 years, unconstitutional in that it impairs obligation of contracts, despite the savings clause which gives the holder one year in which to enforce his rights under the conditions named in the statute.

Desegregation

Brown v. Board of Education of Topeka—The amicus curiae Brief of the Attorney General was designed to persuade the U. S. Supreme Court to understand the reasons for a period of gradual adjustment to desegregation in Florida with broad powers of discretion vested in local school authorities to determine administrative procedures. The Brief attempts to portray, first, the material and the intangible effects in Florida if the decision is carried out. It portrays examples of the legal, administrative, and financial problems involved, as well as intangibles such as the sociological and psychological problems as evidenced by the reactions of the people.

The Brief includes a survey of leadership opinion in the state which emphasizes the great differences in various regions of the state, depending upon the rural or urban character of the area, as well as the percentage of negroes and whites originating from other states.

The ultimate purpose of the Brief is to urge the Court to realize that immediate desegregation would *not* be practical in Florida, nor would any rigid deadline for compliance. The reasoning suggests the granting of indefinite time for compliance based upon the needs and conditions in each particular community; and to allow local school boards to put forth plans most suitable and adaptable to their peculiar situation. The brief is premised on the test of good faith in each community.

Elections—County

Ervin v. Richardson, 70 So. 2d 585—Action for interpretation of statutes relating to nomination of county commissioners. Court held that statutory provision (§100.081, F. S.) that county commissioners be nominated by several districts of county instead of by the county at large violates constitutional provision that county commissioners shall be elected by qualified electors of county at time and place of voting for other county officers.

Elections—Political Parties

Coles v. Robb, 69 So. 2d 322—Quo warranto proceeding to

oust member of political party and chairman of its executive committee. The Supreme Court held that statutory oath of member to support all nominees of the party, state, national and county at next succeeding general election, which occurred in 1950, was not violated by failure to support party candidate for president in 1952 general election.

Fair Trade Act

Miles Laboratories v. Echerd et al, 73 So. 2d 680—Florida Supreme Court held the non-signer clause of the Fair Trades Act, §541.001, F.S., et seq., unconstitutional as an invalid use of police power for private, not public purpose, in that it sanctions anti-competitive price fixing contrary to traditional concepts of free competition.

Succession to Office of Governor

State v. Gray, 69 So. 2d 187—Original proceeding by citizen and taxpayer against Secretary of State and alleged candidate for nomination for Governor, for advisory opinion of court, writ of quo warranto or alternative writ of mandamus directing the Secretary of State to show cause why he should not expunge from records candidate's receipt, oath and election reports. The Court held that death of Governor created vacancy in office of Governor and was the prerequisite for holding an election at next general election to fill such vacancy; that President of Senate was serving as acting Governor for balance of unexpired term, and election to fill such vacancy should properly be held in conjunction with general election for legislative members which would occur during unexpired term.

Labor—Limitation on Right to Strike

Henderson v. State, 65 So. 2d 22—Petition for writ of Habeas Corpus attacking the constitutionality of the Florida Public Utility Arbitration Law, Chapter 453, F.S. The Supreme Court held that Congress by the enactment of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, so completely preempted the regulation of peaceful strikes for higher wages in industries affecting interstate commerce, including public utilities, as to render invalid Chapter 453, F.S., as being in direct conflict with Federal Legislation.

Legislators—Ineligibility for Election to Office

State v. Gray et al, 74 So. 2d 114—Mandamus proceedings to require the Supreme Court to determine the effect of Section 5 of Article III of the Constitution of Florida on the eligibility of Acting Governor Charley E. Johns to become a candidate for the office of governor to fill the unexpired term of Governor Dan McCarty. The relator sought to compel the Secretary of State to expunge from his records all matters pertaining to Senator Johns' candidacy. The Court granted the alternative writ and, by majority opinion, quashed the writ holding that the increase in salary of the Governor provided in the 1953 appropriation bill did not render Senator Johns ineligible for the office of Governor for the two year term beginning January 1955.

Sunday Laws

Henderson v. Antonacci, 62 So. 2d 5—Suit by used automobile dealers to enjoin a sheriff, a state attorney and the Attorney General from enforcing the state Sunday closing laws against them and for a declaratory judgment determining whether such laws are unconstitutional. It held the Sunday closing laws as amended in 1951, are unconstitutional as making wholly arbitrary distinctions without reasonable basis for upholding them as valid exercise of police powers, by exempting from operation of laws the preparation, printing, circulation and sale of newspapers and operation of moving picture theatres... but not used automobile dealers and garages.

Taxation—Dog Race Tracks

Volusia County Kennel Club v. Haggard, 73 So. 2d 884—Florida Supreme Court held that Chapter 28058, Laws of 1953, §550.16, F.S., is unconstitutional in that the statute which imposes an additional graduated tax upon receipts of dog race tracks is a gross receipts tax; that the classifications, which are for tax or revenue purposes, are not based upon substantial difference between various classes established and appear to be arbitrary and capricious and that the effect of attempted imposition is a denial of the equal protection of the law guaranteed by the fourteenth amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida.

State Institutions—Liability of Inmates for Expenses

Warren v. Rhea, 64 So. 2d 567—The Florida Supreme Court in holding that the estate of a lunatic who had been sent to Florida State Hospital under the provisions of the criminal procedure act not liable for the care, maintenance and treatment of the lunatic while in the Florida State Hospital, points out "the great need" for a rehauling by the legislature of the law relating to lunacy generally to cure the many ambiguities, inconsistencies and uncertainties with which it is infected.

State Universities, Law Division—Florida A & M

Gore Application, 66 So. 2d 597—Order Supreme Court upon application of George W. Gore, Jr., President of Florida Agricultural and Mechanical University, approved the course of study of the University's Law Division and authorized recipients of Bachelor of Law Degrees therefrom to take examination for admission to practice law in Florida.

THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al vs. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers,

duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01 and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (§16.06).

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the Statutory Revision Department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.51).

8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).

9. Participate with other states in preserving the constitutional integrity of the state (§16.52).

10. Approve the bond of the comptroller (§17.01).

11. Devise and furnish a form of seal for circuit court of the state (§26.48).

12. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).

13. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the adjutant general's office for military purposes (§73.22).

14. Conduct quo warranto proceedings (§80.03).

15. Represent the state in proceedings under the Declaratory Judgment Law where the constitutionality of statutes is involved (§87.10).

16. Devise a suitable seal for the supervisors of registration (§98.341).
17. Approve title to real estate in which the state is interested (§135.16).
18. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy Act lands (§196.21).
19. Assist in the collection and enforcement of chain store license taxes (§204.13).
20. Prepare contracts for purchase of uniform school books (§233.16).
21. Approve school district bonds (§236.48).
22. Prosecute violations of school budget law (§237.23).
23. Legal advisor to board of trustees of the Teachers Retirement System (§238.03(9)).
24. Represent Board of Control in Eminent Domain proceedings (§240.14).
25. Act as ex officio member and legal advisor of the State Civil Defense Council (§252.05).
26. Conduct condemnation proceedings on behalf of the Armory board (§250.40).
27. Pass upon and approve regulations of district drainage board (§298.53).
28. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§341.17).
29. Act as attorney for the Railroad and Public Utility Commission (this work is negligible because of the fact that the Railroad and Public Utility Commission has authority to employ its own special counsel.) (§§350.29, 350.30, 350.62, 350.66).
30. Assist Railroad and Public Utilities Commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).
31. Give special attention to legal proceedings in connection with the salt water fishing industry (§370.02(8)).
32. Attend to all legal business arising in connection with the laws governing the salt-water fishing industry and State Board of Conservation (§370.02(8)).
33. Conduct suits on bonds of state health officer (§381.10).
34. Enforce the Vital Statistics Law (§382.37).
35. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).

36. Represent the state in disbarment proceedings in the supreme court (§454.28).

37. Assist in the enforcement of the Basic Science Law (§456.22).

38. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

39. Represent the state board of architects in judicial proceeding to which the board may be a party, however, the board is authorized by statute to secure other legal advice or service (§467.14).

40. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

41. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

42. Assist in the enforcement of laws regulating small loan businesses (§516.23)

43. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

44. Investigate and rectify commercial discriminations (§§540.02-540.05).

45. Enforce the anti-trust laws of the state (§542.03).

46. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

47. Prosecute combinations against Florida meats (§544.02).

48. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

49. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).

50. Represent the commissioner of agriculture in connection with the enforcement of Florida seed certification law (§575.08).

51. Enjoin violations of the laws regulating commercial food-stuffs (§580.19).

52. Act as legal advisor and attorney for the State Plant Board (§581.02).

53. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

54. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

55. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

56. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and non profit cooperative associations (§§618.23, 619.09).

57. Sue to recover fines for doing business without a license (§625.17).

58. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).

59. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).

60. Represent the insurance commissioner in connection with insurance matters (§§637.54, 640.13).

61. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).

62. Bring proceedings to recover escheated property (§731.33).

63. Bring proceedings to forfeit prize money in lotteries (§849.12).

64. Conduct extradition hearings for the governor (§941.04).

65. Act as attorney for the Parole Commission. (§947.11).

66. Subversive activities, enforcement of laws re (§§876.22-876.31).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).

2. State Board of Education (Fla. Const. §3, Art. XII, §229.03, Florida Statutes).

3. Interstate Cooperation Commission (§12.05, Florida Statutes).

4. Trustees of Internal Improvement Fund (§253.02, Florida Statutes).

5. State Board of Drainage Commissioners (§298.69, Florida Statutes).

6. State Budget Commission (§216.01, Florida Statutes).

7. State Board of Conservation (§§370.02(1), 377.07, Florida Statutes).

8. State Board of Pardons (Fla. Const. §12, Art. IV).

9. State Canvassing Board (§102.111, Florida Statutes).

10. Florida Securities Commission (§517.03, Florida Statutes).

11. Railroad, etc., Assessment Board (§195.01, Florida Statutes).
12. Board for fixing values of investment securities of trust companies (§660.08, Florida Statutes).
13. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes).
14. State Housing Board (§424.04, Florida Statutes).
15. Department of Public Safety Executive Board (§321.01, Florida Statutes).
16. State Board for Vocational Education (§229.03, Florida Statutes).
17. State Board of Trustees of Teachers, Retirement System (§328.03, Florida Statutes).
18. State Textbook Purchasing Board (§233.13, Florida Statutes).
19. State Purchasing Council (§287.03, Florida Statutes).
20. Member of State Civil Defense Council (§252.05, Florida Statutes).
21. Governor's Cabinet (Fla. Const. §20, Art. IV).
22. Judicial Council (§43.15, Florida Statutes).

STATUTORY REVISION DEPARTMENT

The 1943 Legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., Florida Statutes). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, Florida Statutes), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

- (1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies,

eliminating redundances and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by revisers' bills to be submitted to each session of the Legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the Legislature.

(4) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(5) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) To make a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general who, under authority of §16.43, Florida Statutes, selects a director. The director has the direct supervision and control of the department, who with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of revisers' bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the Legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The revisers' bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of revisers' bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning only one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation or jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning only one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of revisers' bills, the following rules and procedure are adhered to:

- (1) A continuing and systematic study of the statutes is carried on.
- (2) A careful search is made for:
 - (a) Inappropriateness of run-in lines to sections.
 - (b) Misspelled words and poor punctuation.
 - (c) Statutes limited as to time of operation and which have expired.
 - (d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.
 - (e) Laws that have become obsolete.
 - (f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.
 - (g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.
 - (h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.
 - (i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.
 - (j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.
 - (k) Conflicting powers and duties of officials.
 - (l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of the Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the revisers' bills. In the preparation of revisers' bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE

(From Jan. 1, 1953 Through Dec. 31, 1954)

CIVIL CASES

Number of cases pending January 1, 1953	331	
Number of cases docketed between Jan. 1, 1953 and Dec. 31, 1954		
Docketed and pending (1953-1954)	220	
Docketed and closed (1953-1954)	116	336
		667
Number of cases disposed of between Jan. 1, 1953 and Dec. 31, 1954		
Pending January 1, 1953—closed	236	
Docketed and closed (1953-1954)	116	352
		315
Pending January 1, 1955		315

CRIMINAL CASES

Number of cases pending January 1, 1953	140	
Number of cases docketed between Jan. 1, 1953 and Dec. 31, 1954		
Docketed and pending (1953-1954)	193	
Docketed and closed (1953-54)	330	523
		663
Number of cases disposed of between Jan. 1, 1953 and Dec. 31, 1954		
Pending January 1, 1953—closed	140	
Docketed and closed (1953-1954)	330	470
		193
Pending January 1, 1955		193

TOTAL CASES

Total civil and criminal cases pending or docketed during biennium ending December 31, 1954	1330	
Total civil and criminal cases pending or disposed of during biennium ending December 31, 1954	822	
		508
Total civil and criminal cases pending Jan. 1, 1955		508

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Liquor store; church established contrary to zoning regulations; license	054-205
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Anatomical board, funds received by; disposition	053-215
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Basic science law, effective date	053-115
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Blackmail statute; threats in violation of, what constitutes; criminal liability	053-218
Broward county; tax assessor and collector, compensation	053-186
Bruce's Juices, Inc., surety bond, effect of extension certificate	053-103
Budget commission, state; contract specifications for professional consultant services, proposed; legality	053-271
Cavalcade of progress; sale of tickets, award of prizes; legality	054-268
Cemetery corporations; operation for profit; comptroller's supervision powers, expense	053-194
Citrus commission, Florida; reserve funds, unexpended balances, disposition of	054-252
Conflict of laws between two legislative acts; controlling act	053-137
Constables	
Justice of peace district abolished; refund of filing fee	053-28
Warrant, service in nonresident district; authority	054-183
Control, board of	
Construction, use of certain funds for	053-171
Interpretation of resolution, authorizing issuance of University of Florida dormitory revenue certificates of 1948	053-150
Country clubs, real property; tax situs	054-184
County boards of public instruction, interest bearing certificates; issued by; validity; Osceola county	053-205

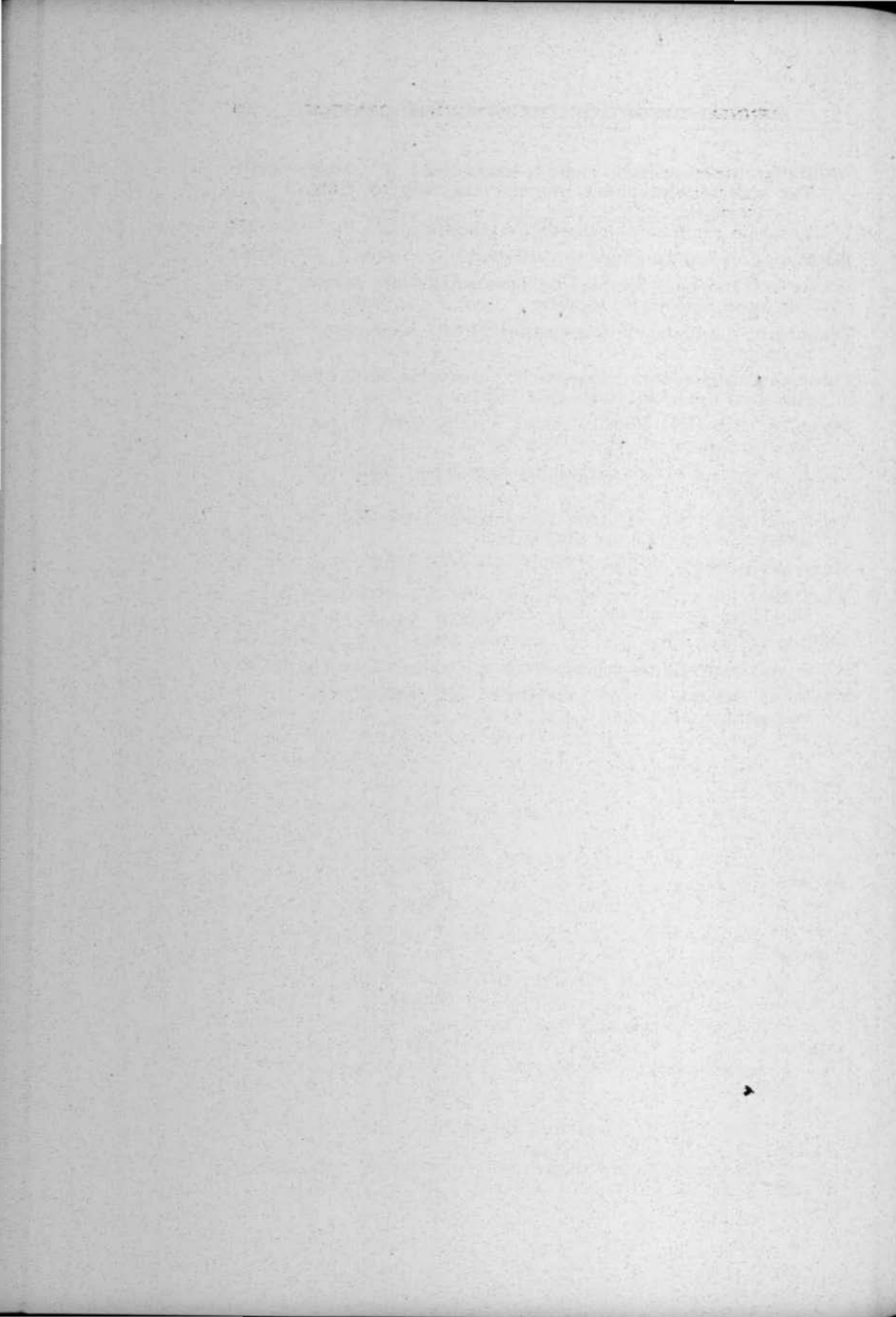
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Collateral pledge to secure advances	054-265
Conveyances between husband and wife; exemption	053-179
Real property, conveyance; absence of monetary consideration; not subject to	054-46
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Gulfport, city of; retirement system, dissolution; validity	053-169
Harbors and ports; board of pilot commissioners, authority generally	053-263
Highway patrol; traffic violators, capture; authority	053-96
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Claim filed, subsequent sale, effect	053-42
Fire department employee; eligibility	054-59
Hospitals, county	
Branch facilities in separate place; authority of board	053-304
Employees, retirement system; applicable	054-273
Federal funds, legal applicant for; Okaloosa county	053-304
Trustees; bond issuance for; requirements	053-15
Hospitals; districts, officers and employees; county retirement system, eligibility	053-89
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Illegal advertising of room rates; published out-of-state; suspension of license	053-200
Title in Bishop's name, tax exemption	053-104
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SUMMARY
of
ADVISORY OPINIONS
rendered the
GOVERNORS OF FLORIDA
by the
JUSTICES
of the
SUPREME COURT OF FLORIDA
under
Article IV, Section 13,
CONSTITUTION OF FLORIDA

by
David V. Kerns
Research Assistant to
Chief Justice John E. Mathews
Supreme Court of Florida.

ADVISORY OPINIONS TO THE GOVERNOR

FOREWORD

While in the active practice of law and since I have been a Justice of this Court, my experience in finding an advisory opinion to the Governor on a particular subject has occasioned considerable difficulty. All of these opinions have the same label and although I would be sure that I had read an advisory opinion to the Governor covering a particular question, I would have difficulty in locating such opinion. Sometimes it would be necessary to read a number of such opinions, consuming a great deal of unnecessary time, before locating the opinion in which I was interested.

This difficulty was due to inadequate indexing of the opinions as to subject.

These opinions are of considerable importance to the members of the judiciary.

In order that the opinions may be easily found, I suggested to David V. Kerns a thorough study of these opinions, with adequate classification and indexing, so that they will be more readily available without the loss of so much time in attempting to find the opinion in point. This summary of opinions, with indexing, has now been completed.

It is hoped that errors and mistakes have been reduced to a minimum. If, however, any appear, it will be appreciated if they are called to my attention so that proper corrections can be made.

JOHN E. MATHEWS,
Chief Justice,
Supreme Court of Florida.

PREFACE

Since the adoption of the Florida Constitution of 1885, the Justices of the Supreme Court have been authorized to advise the Governor as to the interpretation of "any portion of the Constitution" upon any question affecting his "executive powers and duties." The significant expressions of one hundred ten opinions of the Justices (for they speak as individuals rather than as a court) are treated herein; however, it should be noted that this work is not designed to duplicate the functions of an annotated Constitution or a citator, and these should also be consulted in any thorough search.

Under the Constitution of 1868, the Justices could advise the Governor on any question of law. Before then, there was no authority for the Justices to advise the Governor; however, several ex parte expressions of opinion were made, and these are included herein. Most interesting is that in 4 Florida 1, 4, in which the bar generally was called to act as amici curiae to the Court.

DAVID V. KERNS,
Research Assistant to
Chief Justice John E. Mathews,
Supreme Court of Florida.

Tallahassee, Florida,
January 25, 1955.

ADVISORY OPINIONS

(ART. IV. Sec. 13)

A. Decisions Concerning the Nature and Effect of Advisory Opinions.

1. "While advisory opinions to the Governor are not binding judicial precedents, they are frequently very persuasive and usually adhered to." *Lee v. Dowda*, 155 Fla. 68, 19 So. 2d 570.

2. In *State ex rel Williams v. Lee*, 121 Fla. 815, 164 So. 536, the Court adopted Advisory Opinion to the Governor, 114 Fla. 520, 154 So. 154, as the law of the case, saying: "While advisory opinions do not necessarily control in litigated cases, they have a persuasive value, and we think the rule as stated in that opinion is applicable to the case at bar . . ."

3. "The Constitution of Florida only gives to the Governor of the State the right to request advisory opinions from the Justices of this court, and that right is limited to questions arising as to his powers and duties under the Constitution. The differences between a declaratory judgment and a purely advisory opinion is that the former is a binding adjudication of the rights of the parties, even when unaccompanied by the issuance of process to enforce such rights." *BROWN, J.*, concurring specially in *Ready v. Safeway Rock Co.*, 157 Fla. 27, 24 So. 2d 808; quoted with approval in *Ervin v. City of North Miami Beach*, Fla., 66 So. 2d 235.

4. "It is well understood that advisory opinions to the Governor are not of the dignity and status as those rendered on brief and adversary argument. They are confined to pointing out the Governor's authority or duty under the provision of the Constitution cited, without argument of the question presented or citation of authority in support of the conclusion. There have been departures from this rule but it is generally observed.

"Requests for advisory opinions are for the constitutional guidance of the Governor. They may also involve a choice of policy or conduct under the Constitution about which he is in doubt. If the Court should decide that the request was not within the scope of his constitutional inquiry and so advise him, or if for any other reason the answer is such that the Governor concludes that action should be deferred for the present, he may govern himself accordingly. Such opinions are what the name implies, 'advisory' only. They are much like opinions from lawyer to client and partake of the nature of confidential communications." *TERRELL, J.*, concurring specially in *Petition of Kilgore*, Fla., 65 So. 2d 30. To similar effect, see

opinion of BUFORD, J., THOMAS, J. concurring, in *In Re Advisory Opinions to Governor*, 150 Fla. 556, 8 So. 2d 26, 140 A.L.R. 1481, supplemented 151 Fla. 44, 9 So. 2d 172, 140 A.L.R. 1492, cited in "Scope of Advisory Opinions", D, 1 (c) below.

B. Authority to Request Advisory Opinions.

1. Governor under impeachment is without official authority to request opinion of Supreme Court. However, Court will enquire sufficiently to determine whether or not Governor is under impeachment, so as to determine whether or not Justices are required to give him an opinion. In the Matter of Executive Communication of April 17, 1872, 14 Fla. 289.

2. Justices of Supreme Court are not authorized to render advisory opinions to any board, bureau or officer of the State, except to the Governor under this section of the Constitution. *Jones v. Kind*, Fla., 61 So. 2d 188.

3. "The Judiciary is without power to direct or coerce the Governor in the exercise of any administrative function . . . The Supreme Court may only advise the Governor concerning his duty in regard to his executive powers and duties when requested" by him under this section. *State ex rel Axleroad v. Cone*, 137 Fla. 496, 188 So. 93.

4. In making executive appointments, Governor has the right to determine for himself or to ask for determination under this section whether a vacancy exists in an office and whether he has authority to fill it. *State ex rel Landis v. Bird*, 120 Fla. 780, 809, 163 So. 248, 261.

C. When Opinion becomes Public Record; Withdrawal of Request.

While request is within breast of the Court and until reply is delivered to Governor, advisory opinion is treated as any other "case" or matter under consideration, not subject to public inspection or inquiry; if it becomes a public record as contemplated by Sec. 119.01, F.S., it does not do so until it is delivered to the Governor and filed with the Clerk of the Supreme Court. — The request may be withdrawn at any time. *Petition of Kilgore, et al.*, Fla., 65 So. 2d 30.

D. Scope of Advisory Opinions.

1. "Portion of Constitution"; statute involved; etc.
 - (a) Under the interpretation adhered to prior to 1920, the Justices held they had no authority to advise concerning the validity or constitutionality of statutes: In re Opinion of Supreme Court, 39 Fla. 397, 22 So. 681; Advisory Opinion to the Governor, 50 Fla. 169, 39 So. 187; In re Opinion of Justices, 54 Fla. 136, 44 So. 756; In re Opinion of Judges, 62 Fla. 4, 57 So. 345; In

re Advisory Opinion to the Governor, 64 Fla. 1, 59 So. 778; In re Opinions of the Justices, 69 Fla. 632, 68 So. 851; In re Opinion of the Justices, In re Circuit Judges, 69 Fla. 653, 68 So. 849; In re Advisory Opinion to the Governor, 78 Fla. 9, 82 So. 608; In re Advisory Opinion to the Governor, 103 Fla. 668, 137 So. 881.

Requests concerning the following subjects were refused consideration by the Justices:

- (1) Validity of pardon granted without concurrence of Governor, since same should be settled in litigated adversary proceeding. In re Opinion of Supreme Court, 39 Fla. 397, 22 So. 681.
- (2) Power of Governor in issuing death warrant because duty is statutory. Ibid. (See similar request, In re Advisory Opinion to Governor, 154 Fla. 866, 19 So. 2d 370, under 2(b) below).
- (3) Constitutionality of statute authorizing Governor to execute deeds to State lands and to countersign warrants thereunder. Advisory Opinion to Governor, 50 Fla. 169, 39 So. 187.
- (4) Whether certain statutes have the legal meaning and effect of an appropriation. In re Opinion of Justices, 54 Fla. 136, 44 So. 756.
- (5) Authority to countersign warrants where real question is constitutionality of certain statutes. In re Opinion of Judges, 62 Fla. 4, 57 So. 345.
- (6) Authority to countersign warrants for advertisements of constitutional amendments where real question was legality of their adoption by the legislature. In re Advisory Opinion to the Governor, 64 Fla. 1, 59 So. 778.
- (7) Any matter necessarily involving the constitutionality of a statute. Justices are not authorized in an advisory opinion to construe statutes. Although an advisory opinion is not binding upon the Court and is open to reconsideration and revision, yet, if it questioned the validity of a statute, it would create a doubt as to the effect of such statute which the Justices of the Court should not bring about upon an ex parte consideration of the subject. In re Opinions of the Justices, 69 Fla. 632, 68 So. 851.

Justices are not authorized in an advisory opinion to construe statutes. In re Opinion of the Justices, In re Circuit Judges, 69 Fla. 653, 68 So. 849. However, constitutionality of a statute was declared "extremely doubtful" in Advisory Opinion to Governor, 156 Fla. 55, 22 So. 2d 458.

(8) Authority of Governor to countersign warrants for expenses incurred under a particular statute. In re Advisory Opinion to Governor, 78 Fla. 156, 82 So. 606.

(9) Authority of Governor to countersign warrant in payment of rental for private road leased by State Road Department. In re Advisory Opinion to Governor, 103 Fla. 668, 137 So. 881.

(10) Whether a State Health Officer is an officer to be appointed by Governor or is an employee to be employed by State Board of Health. The Justices cannot advise the Governor upon the scope and effect of a statute, but only upon some feature of the Constitution that affects some executive power or duty. In re Advisory Opinion to the Governor, 78 Fla. 9, 82 So. 608.

NOTE. The opinion rendered February 13, 1920, reported at 79 Fla. 137, 83 So. 672, noted herein under Appropriations (6), appears to be the first time a statute was construed in an advisory opinion.

(b) However, Justices are authorized to advise Governor whether countersignature of warrants will violate any provision of Constitution; Governor advised that sections of Constitution made salaries of circuit judges and state attorneys continuing constitutional appropriations, irrespective of amount named or specified in general appropriations act. In re Advisory Opinion to the Governor, 114 Fla. 520, 154 So. 154. ELLIS, J. dissents.

(c) Statutes may be interpreted in an advisory opinion only when and as they directly affect the executive powers and duties of the Governor under the Constitution. The interpretation does not go beyond the relation to execute powers and duties of Governor under Constitution.

In rendering advisory opinions, Justices do not act as Judicial body but as individual judicial officers. The opinion is not binding on the Governor — only advisory. It is not binding on the Court so as to be controlling in litigated cases. (Opinion of BUFORD, J., THOMAS, J. concurring.) In re Advisory Opinions to Governor, 150 Fla. 556, 8 So. 2d 26; 140 A.L.R. 1481; supplemented 151 Fla. 44, 9 So. 2d 172, 140 A.L.R. 1492. (Each advisory consisted of three opinions.)

2. (a) "Executive powers and duties" upon which opinion of Justices may be required means duty pertaining to execution of laws as they exist. In re Executive Communication concerning Powers of Legislature, 23 Fla. 297, 6 So. 925; In re Advisory Opinion to the Governor,

92 Fla. 989, 111 So. 252. — Request will be declined:

(1) As to constitutionality of legislative bill, the enactment of laws and any duty of Governor therein, such as veto, being a legislative duty. In re Executive Communication concerning Powers of Legislature, 23 Fla. 297, 6 So. 925.

(2) As to legality of an election. In re Advisory Opinion to Governor, 92 Fla. 989, 111 So. 252.

(3) Submission of amendment to Constitution of United States did not involve any "executive power or duty" of Governor and therefore Justices were not authorized to interpret constitutional provision relating thereto. An executive duty appertains to the execution of laws as they exist. Advisory Opinion to Governor, 61 Fla. 1, 55 So. 460.

(b) Opinion granted as to executive duties imposed on Governor in regard to execution of sentence of death for one convicted of capital crime. In re Advisory Opinion to Governor, 154 Fla. 866, 19 So. 2d 370. Three Justices (ADAMS, SEBRING, THOMAS) dissent on the ground the opinion is not within the scope of the Justices' authority to advise. (In accord with dissent, see In re Opinion of Supreme Court, 39 Fla. 397, 22 So. 681, *supra*.)

APPROPRIATIONS

1. Request for advisory opinion **declined** where involving:

(a) Whether certain statutes together constituted an appropriation. In re Opinion of Justices, 54 Fla. 136, 44 So. 756.

(b) Whether Governor authorized to countersign warrants for expenses incurred under a particular statute. In re Advisory Opinion to Governor, 78 Fla. 156, 82 So. 606.

(c) Whether Governor authorized to countersign warrant in payment of rental for private road leased by State Road Department. In re Advisory Opinion to Governor, 103 Fla. 668, 137 So. 881.

2. Money may not be appropriated from State Treasury merely by resolution of one house of Legislature, but only by statute duly enacted with the formalities prescribed by the Constitution. In re Advisory Opinion, 43 Fla. 305, 31 So. 348; Advisory Opinion to Governor, 156 Fla. 45, 22 So. 2d 397 (travel expenses of legislative committee between sessions); Advisory Opinion to Governor, 156 Fla. 48, 22 So. 2d 398 (see 3. below); In re Advisory Opinion to Governor, Fla., 55 So. 2d 99 (expenses of interim House committee between sessions).

3. (a) Appropriations of amounts in excess of limitations contained in the Constitution cannot lawfully be disbursed. Statute authorizing payments to legislators for expenses in excess of the allowances prescribed by Constitution cannot be given effect. In re Advisory Opinion to Governor, 90 Fla. 708, 107 So. 366.

(b) Payments to legislators of amounts for expenses in excess of that provided by Constitution is invalid since constitutional provision is exclusive. Advisory Opinion to Governor, 156 Fla. 48, 22 So. 2d 398. Two Justices (ADAMS, BUFORD) dissent, holding resolution valid as finding that expenses are legitimate legislative expense and payment of same may be made if statute is adopted authorizing payment of legislative expense.

(c) Allowance to members of legislature of \$6.00 per day for postage and incidental expenses is legitimate legislative expense other than per diem and mileage provided by Constitution and may be paid when authorized by statutory appropriation. Advisory Opinion to Governor, 158 Fla. 872, 30 So. 2d 377 (two Associate Justices signed opinion, along with four Justices).

4. A law making appropriations for salaries of public officers and other current expenses of the State cannot, under the Constitution, contain provisions upon any other subject. In the Matter of Executive Communication of February 19, 1872, 14 Fla. 283; In the Matter of Executive Communication of February 29, 1872, 14 Fla. 285.

A clause in such an act prescribing the manner in which public dues may be paid is void. In the Matter of Executive Communication of February 19, 1872, 14 Fla. 283.

A provision in such an act directing the payment of interest on public debt and other expenses of State is void. In the Matter of Executive Communication of February 29, 1872, 14 Fla. 285.

5. Sections of Constitution made salaries of circuit judges and state attorneys, which are constitutional officers, payable as continuing constitutional appropriations, irrespective of general appropriation act. In re Advisory Opinion to Governor, 114 Fla. 520 154 So. 154.

Governor was not authorized to countersign warrant for salary greater than that fixed by general law despite appropriation of sum consistent with budget commission's recommendation of larger sum. In re Opinion of the Justices, 120 Fla. 734, 163 So. 78.

Salary of Justice added to Supreme Court by constitutional amendment should be paid under authority of statute fixing salaries of Justices and making continuing appropriation therefor, despite lack of provision in general appropriation act; salary of Justice's secretary payable from contingent

appropriation for Supreme Court. In re Opinion of the Justices, 145 Fla. 375, 199 So. 350.

6. An appropriation by statute for a particular year cannot lawfully be paid out for expenses incurred during the succeeding year, and Governor is not authorized to countersign warrant in payment of expenses incurred in one year to be paid from the appropriation for the previous year. In re Advisory Opinion to Governor, 79 Fla. 137, 83 So. 672. (This opinion, February 13, 1920, was first time Court construed a statute in an advisory opinion.)

7. Receipts of constitutional gasoline tax should be distributed by State Board of Administration in same manner as funds were paid by prior statutory board and by warrant of the Comptroller countersigned by the Governor. In re Advisory Opinion to Governor, 152 Fla. 356, 11 So. 2d 580.

See also SALARIES; PENSIONS.

BONDS (State Bonds)

1. Provision of Constitution authorizing Legislature to issue State bonds for "perfecting public works" referred to system of railways initiated under internal improvement acts of mid-1850's. History of the times shows railways were considered public works. In the Matter of Executive Communication of February 6, 1871, 13 Fla. 699.

2. Construction and maintenance of State roads are among the current expenses of the State which Constitution commands the Legislature to raise sufficient revenue to defray. The Constitution does not contemplate issuing bonds for current expenses. State bonds can be issued only for certain purposes: The spirit and intent of the inhibition should be given full effect. In re Advisory Opinion to Governor, 94 Fla. 967, 114 So. 850.

CLAIMS

1. Article 16, Sec. 11 of Constitution was not applicable to a situation where a road planned in contract of state road department was intended to reach a certain destination but it later developed that the road fell short of the destination by 2710 feet, and Governor was authorized to countersign warrant in payment of work incurred by state road department in extending the road said distance, without which the road would have been worthless. Article 4.3 of said department's Standard Specifications authorized and did not prohibit the extension, since character of work was not changed. Advisory Opinion to the Governor, 50 Supreme Court Minutes 395.

CONSTITUTION

A. Florida

1. Effect of amendment of section of Constitution:

Added portions take effect upon adoption;
Omitted portions lose effect upon adoption;
Repeated portions continue in force;
New section becomes the entire law, and the old section ceases to have legal effect.

In the Matter of Executive Communication of October 5, 1875, 15 Fla. 735. (Change in term of Justices of Peace.)

Amended section of Constitution becomes entire law. In the Matter of Executive Communication of November 8, 1875, 15 Fla. 739. (Sessions of Legislature made biennial.)

Amendment to Constitution becomes effective eo instanti upon its approval and adoption by the majority vote of the electors of the State. Provision in constitutional amendment, "under such regulations as shall be prescribed by law", did not postpone the operative effectiveness of the amendment as part of the Constitution until regulations were provided by the Legislature. In re Advisory Opinion to Governor, 34 Fla. 500, 16 So. 410.

2. Request for opinion of Justices whether proposed constitutional amendment was duly adopted by Legislature declined. In re Advisory Opinion to Governor, 64 Fla. 1, 59 So. 778.

As to propriety of request involving constitutionality of statute, see **ADVISORY OPINIONS**.

3. An amendment to the Constitution must be construed in pari materia with other provisions on the subject, but is latest expression of intent and modifies or supersedes any prior provision to the extent inconsistent or repugnant therewith. Advisory Opinion to Governor, 152 Fla. 686, 12 So. 2d 876. (Circuit Judges made elective.)

4. Clause of Constitution will not be considered surplusage if a meaning can be given it. In the Matter of Executive Communication of February 6, 1871, 13 Fla. 699.

5. State Constitution should be construed to effectuate allegiance to Federal Government. In re Advisory Opinions to Governor 150 Fla. 556, 8 So. 2d 26, 140 A.L.R. 1481, supplemented 151 Fla. 44, 9 So. 2d 172, 140 A.L.R. 1492.

B. United States

1. Submission of amendment to Constitution of United States did not involve any "executive power or duty" of Governor and therefore Justices were not authorized to

interpret constitutional provision relating thereto. Advisory Opinion to Governor, 61 Fla. 1, 55 So. 460.

Vacancy by death of U. S. Senator, see **ELECTIONS** (2)

COUNTY

1. County officers generally are those whose duties are co-extensive with the county, as State officers act throughout the State. Counties must pay expense of carrying out county purposes imposed by Constitution or statute, including fees or per diem of county officers. In the Matter of Executive Communication of June 2, 1870, 13 Fla. 687.

2. Opinion pertains to: Creation of new counties; creation of county "for judicial purposes only"; boundary lines of counties and changing same. In the Matter of Executive Communication of January 16, 1873, 14 Fla. 320.

See also **OFFICERS, A.**

CRIMINAL LAW

1. A pardon removes the punishment and the guilt, as though offense was never committed, although, it does not restore offices forfeited or property or interest vested in others in consequence of conviction and judgment. In the Matter of Executive Communication of September 23, 1872, 14 Fla. 318.

2. (a) Request for opinions of Justices as to grant of pardon without concurrence of Governor and as to power of Governor in issuing death warrant was declined. In re Opinion of Supreme Court, 39 Fla. 397, 22 So. 681.

(b) At least five clear days must elapse between the date of issuance of the death warrant and the beginning of the week during which the execution of the sentence of death thereby directed shall occur. In re Advisory Opinion to Governor, 154 Fla. 866, 19 So. 2d 370. Three Justices dissent on the ground the opinion is not within the scope of the justices' authority to advise.

(c) The Board of Pardons (and not Governor, has duty to determine whether conditions upon which death sentence was commuted have been breached and has power, if same was breached, either to restore sentence or waive breach. If the commutation is revoked, the Governor's duty to execute sentence is restored. Advisory Opinion to Governor, 156 Fla. 507, 23 So. 2d 619.

3. Under constitutional authority, Governor may grant successive reprieves in criminal cases, provided each reprieve shall be for a period not exceeding 60 days. In re Advisory Opinion to Governor, 62 Fla. 7, 55 So. 865. **SHACKLEFORD, J.** dissents, holding total reprieves may not exceed 60 days. As to report of Governor to Legislature of fines, forfeitures, pardons and reprieves, see **LEGISLATIVE** (8). As to ques-

tions on which Justices declined to give opinion, see **ADVISORY OPINIONS. D.**

ELECTIONS

1. Justices are not authorized to advise Governor with reference to legality of an election. Art. IV, Sec. 13. Where tax collector died 13 days before general election and county commissioners made provision for election of successor for unexpired term and one person received 543 votes distributed throughout the county, regularity of election will be assumed. It being assumed that officer's election was regular and proper, it was Governor's duty to commission him. In re Advisory Opinion to Governor, 92 Fla. 989, 111 So. 252.

2. Governor is authorized to issue writ of election to fill vacancy caused by death of U. S. Senator, under Federal Constitution.

Governor was authorized to fill vacancy caused by death of U. S. Senator by appointment and grant commission for unexpired term.

"Any election should be an intelligent expression of the electorate, both as to men and measures involved, and that requires time for deliberation." Advisory Opinion to Governor, 157 Fla. 885, 27 So. 2d 409.

3. Governor has authority under statute to call first primary and, if necessary, second primary, for election for full six-year term as Justice of Supreme Court, where incumbent nominee died after regular primaries and before general election. By implication, Governor also had authority to set the date of such special primaries. In re Advisory Opinion to Governor, Fla., 60 So. 2d 285.

4. Where there was no Republican nominee and Democratic nominee died after regular primaries and before general election, there was no "vacancy in nomination" as to Republican party and Governor was not under duty to call special election for Republican nomination. In re Opinion to the Governor, Fla. 60 So. 2d 321.

See also **OFFICERS.**

GASOLINE TAX (See **APPROPRIATIONS 7.**)

GOVERNOR

1. Where State warrants were countersigned in name of Governor prior to his death, acting Governor had authority to issue executive proclamation adopting, ratifying and confirming countersignature as his.

Upon death of Governor, President of Senate was authorized to designate himself "Acting Governor". Advisory Opinion to Acting Governor, Fla. 67 So. 2d 413.

2. (a) The enactment of laws and any duty of Governor therein, such as veto, is a legislative duty. In re Executive Communication concerning Powers of Legislature, 23 Fla. 297, 6 So. 925.

(b) Duty of Governor to sign legislative bills, if he approves them, upon passage and presentation to him, is executive rather than judicial. Advisory Opinion to Governor, 152 Fla. 547, 12 So. 2d 583.

3. Officer's election being presumed regular, it was Governor's duty to commission him. In re Advisory Opinion to Governor, 92 Fla. 989, 111 So. 252.

4. Extent of Governor's emergency powers. In re Advisory Opinions to Governor, 150 Fla. 556, 8 So. 2d 26, 140 A.L.R. 1481, supplemented 151 Fla. 44, 9 So. 2d 172, 140 A.L.R. 1492.

5. Act to limit power of Governor concerning appointments held unconstitutional. Advisory Opinion 25 Fla. 426, 5 So. 613. See also, *State ex rel Landis v. Bird*, 120 Fla. 780, 809 163 So. 248, 261.

6. However, statute requiring members of Overseas Road and Toll Bridge District to be voters of Monroe County imposed qualification on office and was not legislative appointment. Governor was bound thereby. Advisory Opinion to Governor (1945) 156 Fla. 168, 23 So. 2d 158.

As to interpretations of "executive powers and duties", see **ADVISORY OPINIONS**. As to militia, see **MILITIA**.

IMPEACHMENT

As to officers liable to impeachment, see **OFFICERS. E**.

1. Supreme Court has no jurisdiction to inquire into impeachment, same being solely for Senate. Governor was found to be under impeachment and his request for opinion was therefore declined. In the Matter of Executive Communication of April 17, 1872, 14 Fla. 289, **RANDALL, C. J.**, dissenting, distinguished House of Lords and Florida Senate and holds, when Senate adjourns, not to re-convene prior to expiration of term of impeached officer, and has not tried or otherwise disposed of impeachment, it loses jurisdiction, proceedings become a nullity, and officer restored to office. However, he acceded to majority view.

2. Impeachment of Governor, brought by Assembly (House of Representatives) before Senate consisting of less than majority of the Senators of all Senatorial districts in existence and electing a Senator, could not be acted upon and was invalid. In the Matter of Executive Communication of November 9, 1868, 12 Fla. 653.

JUDGES

See also **ELECTIONS, OFFICERS**. As to appropriations for salaries, see **APPROPRIATIONS**.

1. Supreme Court; Justices.

(a) Under constitutional provision of 1838, effective 1845, providing Supreme Court should be composed of Circuit Judges until otherwise provided by the General Assembly, and acts of 1851 organizing Supreme Court of three Justices, Circuit Judges were eligible to serve on Supreme Court in lieu of Justices disabled by interest, despite constitutional provision that certain State officers, including Circuit Judges, should be ineligible for election or appointment to any other and different office until one year after having ceased to be such officer. Opinion of Court in re authority of Judges of Circuit Court to sit in Supreme Court as Justices thereof, 4 Florida 1, 4.

(b) Discussion of organization of Supreme Court. Opinions by the Chief Justice, 8 Fla. 466; 8 Fla. 478; Opinion of the Chief Justice, 8 Fla. 496. (The first two were "newspaper essays", apparently extra-judicial, reprinted by the reporter, in explanation of the Court's remarks (p. 460) in Motion to call Circuit Judges, 8 Fla. 459. The third was in the nature of a dissent from action of two Justices, 8 Fla. 495, expunging order of Chief Justice summoning them out of term, and issuing warrant for one.

(c) Governor has authority under statute to call first primary and, if necessary, second primary, for election for full six year term as Justice of Supreme Court, when incumbent nominee died after regular primary and before general election. By implication, Governor also had authority to set the date of such special primaries. In re Advisory Opinion to Governor, 60 2d 285.

(d) Salary of Supreme Court Justice was payable by continuing appropriation made by statute fixing Justices' salaries, despite inadequacy of funds provided by biennial general appropriation act. In re Opinion of the Justices, 145 Fla. 375, 199 So. 350.

2. Circuit Court.

(a) Circuit Judge: —

— Is constitutional officer. His salary is a continuing constitutional appropriation. In re Advisory Opinion to the Governor, 114 Fla. 520, 154 So. 154.

— Is not subject to suspension or removal from office by the Governor. Opinion of the Justices, 67 Fla. 489, 65 So. 224.

— Though ill for long period, is still Circuit Judge and Governor is not authorized to appoint a successor. In re Opinion of Justices, 67 Fla. 423, 65 So. 4.

— May be transferred among circuits by Governor. In re Advisory Opinions to Governor, 150 Fla. 556, 8 So. 2d 26, 140 A.L.R. 1481; 151 Fla. 44, 9 So. 2d 172, 140 A.L.R. 1492.

— Became elective in 1948, and prior thereto was appointive. Advisory Opinion to Governor, 152 Fla. 686, 12 So. 2d 876.

— Continues during the life of his commission to be Circuit Judge of circuit that includes county of his residence, irrespective of changes that may be made by legislation in the circuit embracing that county. In re Opinion of the Justices, in re Circuit Judges, 69 Fla. 653, 68 So. 849.

— Who, holding commission as additional circuit judge, resides in county which is embraced in new circuit divided off from old circuit, becomes circuit judge of new circuit. Sections 8, 35 and 43 of Article V should be construed together as one constitutional provision. In re Advisory Opinion to Governor, 93 Fla. 948, 113 So. 113.

— May be called to sit in Supreme Court as Associate Justice thereof. Opinion of Court, etc., 4 Fla. 1, 4.

(b) — Enactment of act providing additional circuit judge created a new office at once. In re Advisory Opinion to Governor, 93 Fla. 1024, 113 So. 115. Office of additional circuit judge is created by statute adopted pursuant to constitutional authority. Advisory Opinion to Governor, 156 Fla. 55, 22 So. 2d 458.

3. Appointment of Circuit Judges prior to 1948.

(a) When Constitution provided for Circuit Judges to be appointed by Governor and to hold office for 8 years, term of Circuit Judge was 8 years from his appointment, without reference to unexpired portion of predecessor's term. Advisory Opinion in the Matter of Tenure of Office of Judges of Circuit Courts (1877), 16 Fla. 841.

(b) Term of office of Circuit Judge was for six years from appointment of first incumbent. In re Advisory Opinion to Governor (1919) 76 Fla. 649, 80 So. 519; In re Advisory Opinion to Governor (1927), 93 Fla. 1024, 113 So. 115; Advisory Opinion to Governor (1931), 101 Fla. 1510, 136 So. 623.

(c) Appointment by Governor to circuit judgeship unless or until confirmed by Senate, extended only to end of next Senate session. Commission of person appointed

by Governor and confirmed by Senate extended to end of the unexpired term. In re Advisory Opinion to Governor (1903), 45 Fla. 154, 34 So. 571; In re Advisory Opinion to Governor (1919) 76 Fla. 649, 80 So. 519; In re Advisory Opinion to Governor (1927), 93 Fla. 1024, 113 So. 115.

(d) Appointment for unexpired term, made by Governor and confirmed by Senate, was independent of preceding appointment to end of session. Advisory Opinion to Governor (1941), 147 Fla. 157, 2 So. 2d 378.

(e) If desired, Circuit Judge could be appointed by Governor and confirmed by Senate for succeeding term prior to expiration of preceding term. Advisory Opinion to Governor (1931) 101 Fla. 1510, 136 So. 623; Advisory Opinion to Governor (1941) 147 Fla. 157, 2 So. 2d 378.

(f) Since Constitution contemplates confirmation of appointees at earliest opportunity, Governor should submit appointments to special session. In re Advisory Opinion to Governor (1912), 64 Fla. 16, 59 So. 782.

(g) When a new judicial circuit is created, the appointment of a judge for such circuit should be for a term equal to the unexpired term of the other Circuit Judges. In re Advisory Opinion to the Governor (1919), 78 Fla. 5, 82 So. 612.

(h) Governor had duty to appoint additional circuit judge where last census taken before act showed population in excess of 75,000. In re Advisory Opinion to the Governor (1923) 85 Fla. 505, 97 So. 127.

(i) Appointment of circuit judges for 6-year term from date 60 days after effective date of act held proper. In re Advisory Opinion to the Governor (1935), 120 Fla. 142, 162 So. 346.

(j) Amendment to Constitution extended term of circuit judge to expiration of commission, by express provision. Advisory Opinion to the Governor (1937), 128 Fla. 334, 174 So. 740.

(k) Terms of Circuit Judges became defined by law as running in 6-year cycles from July 30, 1935. Advisory Opinion to Governor (1941), 147 Fla. 157, 2 So. 2d 378.

4. Other Judges.

(a) A result of the adoption of Art. V, Sec. 47, is that all judges of criminal courts of record and county solicitors are elected by the qualified electors for four year terms in the same manner that other county officers are

elected. Clerk of such court, provided for by statute creating court, shall be elected in similar manner, as provided in the Constitution. Advisory Opinion to the Governor (1949), 42 So. 2d 170.

(b) Under Constitution and statutes, Governor had authority to assign judge of Court of Record of Escambia County to serve pro hac vice as Judge of any criminal court of record. In re Advisory Opinion to Governor, 153 Fla. 344, 14 So. 2d 663.

(c) General statute concerning substitution of judges controls substitution of judge of a small claims court created by special statute which makes no provision on the subject, and not general small claims court statute. Governor should appoint as substitute a judge whose court has jurisdiction at least equivalent in amount to that of the small claims court. In re Advisory Opinion to Governor, Fla. 58 So. 2d 319.

(d) Governor is authorized to assign any other small claims court judge of comparable or greater jurisdiction to serve in lieu of Judge of Small Claims Court of Putnam County.

Only if all circuit judges of 13th Circuit cannot act should Governor assign a circuit judge to the senior 13th Circuit Judge for assignment to the Civil Claims Court of Hillsborough County.

In re Advisory Opinion to Governor, Fla., 63 So. 2d 274. TERRELL, J. separately stated the view that other additional judges may be assigned.

LEGISLATIVE

1. The Legislature is the sole judge of its members. Members of "Secession Convention" were not prohibited from holding public office. Opinion Rendered to His Excellency the Governor in the Matter of Executive Communication of October 14, 1868, 12 Fla. 651.
2. A majority of the Senators of all Senatorial Districts in existence and electing a Senator is necessary to conduct business and therefore an impeachment of the Governor brought by Assembly (House of Representatives) could not be acted upon by a Senate lacking such membership and was invalid. In the Matter of Executive Communication of November 9, 1868, 12 Fla. 653.
3. Senate of United States is sole judge of selection and qualification of its members; Supreme Court of State has no jurisdiction to decide same. In the Matter of Executive Communication of January 29, 1869, 12 Fla. 686.

4. (a) Members of legislature are not officers; whose pay ... is included in constitutional provision that "salary of officers" shall be payable quarterly. In the Matter of Executive Communication of January 29, 1869, 12 Fla. 689.

(b) The acceptance by a Senator of an appointment and commission to another office, such as county solicitor or prosecuting attorney, vacates the person's right and status as a member of the Senate. In re Advisory Opinion to Governor, 76 Fla. 418, 79 So. 874.

5. (a) Members of Legislature are ineligible for appointment to office as member of board of control, created during their term, despite the fact the office carried no salary.

Legislator cannot make himself eligible by resigning from Legislature. In re Members of Legislature, 49 Fla. 269, 39 So. 63.

(b) No member of Legislature of 1927 could be appointed motor vehicle commissioner or special assistant attorney-general, same being state offices created by said session, during time for which he was elected, even though he resign from Legislature. Advisory Opinion to Governor, 94 Fla. 620, 113 So. 913.

(c) No member of Legislature is eligible for office of additional circuit judge created by statute until his term expired. Provision withholding increase in salary or emoluments from members of Legislature appointed to office (Gomez Clause) is an effort to circumvent lawfully the constitutional prohibition on such appointment and is repugnant to constitutional and statutory provisions that additional circuit judge shall receive same salary as other circuit judges. Advisory Opinion to Governor, 156 Fla. 55, 22 So. 2d 458.

6. Constitutional amendment providing for biennial sessions of Legislature, in lieu of annual sessions, left no authority for session of 1876. In the Matter of Executive Communication of November 8, 1875, 15 Fla. 739.

7. (a) The enactment of laws and any duty of Governor therein, such as veto, is legislative duty. In re Executive Communication concerning powers of Legislature, 23 Fla. 297, 6 So. 925.

(b) So long as requirement of Constitution that both houses of Legislature keep and publish journal and record therein ayes and nays on any question when requested by 5 members is complied with, other requirements as to bills may be provided by rule. References to bill by full title may be reduced without invalidating bills and Governor may constitutionally sign or disapprove them.

Duty of Governor to sign bills, if he approves them, upon

passage and presentation to him, is executive rather than judicial. Advisory Opinion to Governor, 152 Fla. 547, 12 So. 2d 583.

8. Report of Governor to Legislature at every session of every case of fine or forfeiture remitted or reprieve, pardon, or commutation granted was intended to apply only at regular sessions of Legislature and need not be given at special sessions, unless special provision therefor is made. Same is "legislative business" considered by Legislature in its visitorial capacity. In re Advisory Opinion to Governor, 64 Fla. 21, 59 So. 786.
9. The terms of members of the Legislature run from general election to general election, so membership in period intervening between general election and regular session includes those newly elected at general election and not those who previously served. In re Advisory Opinion to Governor, 76 Fla. 417, 79 So. 875.
10. Where act to repeal a particular section of Florida Statutes correctly referred to it by number in title but reference to it by number in body of act was incorrect and act as a whole showed clear purpose to follow language of title and repeal section, act was construed as repealing said section. In re Advisory Opinion to Governor, 153 Fla. 581, 15 So. 2d 291.
11. (a) The Constitution clearly contemplates joint action by the Governor and the Senate in the matter of appointments to office when possible and as soon as possible and, hence, Governor should submit appointments to special session, rather than await next regular session. Confirmation of appointments is not "legislative business" within meaning of limitation on subjects in call for special session. In re Advisory Opinion to Governor, 64 Fla. 16, 59 So. 782.

(b) Appointment of acting officer, to act in place of regular officer granted leave of absence for military service, does not require confirmation by Senate. Advisory Opinion to Governor, 152 Fla. 674, 12 So. 2d 879.
12. Wisdom of legislation is not for judicial consideration. In the Matter of Executive Communication of February 6, 1871, 13 Fla. 699.

As to statute or resolution authorizing allowances or other payments to members of Legislature, see APPROPRIATIONS (3); as to expenses of interim legislative committee, see APPROPRIATIONS (2).

MILITIA

1. The militia of the State is all able-bodied male inhabitants between 18 and 45 years of age that are citizens of

United States or have declared their intention of becoming citizens thereof.

The Governor of the State is authorized to call out the militia, in any organized company of so-called county guards, for the purposes provided in Art. XIV, Sec. 4: to preserve the peace, execute the laws, suppress insurrection, etc. In re Advisory Opinion to Governor, 74 Fla. 92, 77 So. 87.

OFFICERS

As to election to fill vacancy, see ELECTIONS.

As to salary and pension, see APPROPRIATIONS.

As to Justices and Judges, see JUDGES; as to terms and appointment of Judges, see JUDGES.

A. "Office" and various offices defined:

1. "Office" and "employment" distinguished and compared; test stated:

(a) Trustee of Jacksonville Free Public Library is neither an officer nor an employee of the City, so as to disqualify him for appointment to Civil Service Board of Duval County. In re Advisory Opinion to Governor, 153 Fla. 650, 15 So. 2d 765.

(b) "Office" defined; official court reporters are not officers, but employees, and may be employed in manner authorized by statute, provided authorized number is not exceeded. In re Opinion of the Justices, 120 Fla. 729, 163 So. 76.

(c) Inspectors and supervisors who have governmental authority and duties prescribed by statute are **officers**. In re Advisory Opinion to the Governor, 76 Fla. 500, 80 So. 17.

(d) "State Health Officer" as an officer. In re Advisory Opinion to the Governor, 78 Fla. 9, 82 So. 608.

(e) "Officer", "employee" and "deputy" defined and compared. In the Matter of Executive Communication of October 14, 1868, 12 Fla. 651.

2. "State officer" defined:

(a) Motor vehicle commissioner and special assistant attorneys-general are "**State officers**" — a "civil" office. No member of Legislature of 1927 may be appointed motor vehicle commissioner or special assistant Attorney-General during time for which he was elected, even though he resign from Legislature. Advisory Opinion to Governor, 94 Fla. 620, 113 So. 913.

(b) Members of State Planning Board are **State officers**; persons holding another state office may not be appointed

to same; however, membership ex officio was merely imposition of additional duty on Chairman of State Road Department. Advisory Opinion to Governor, 146 Fla. 622, 1 So. 2d 636.

(c) Hotel and Restaurant Commissioner is **state officer** who must be elected by people or appointed by Governor; appointment by Governor and cabinet is unconstitutional. Remainder of act, being interwoven, also falls and prior law is reinstated. In re Advisory Opinion to Governor, Fla., 63 So. 2d 321.

As to members of Legislature, their status as officers and eligibility for other offices, see **LEGISLATIVE**.

3. Members of county boards of public instruction are "statutory elective officers." Advisory Opinion to Governor, 154 Fla. 822, 19 So. 2d 198; in re Advisory Opinion to Governor, 46 So. 2d 21.

Members of county board of public instruction, being **statutory elective officers**, may be suspended only by the Governor; they are not "subordinate school officers" (Art. 12, Sec. 3), which term has no reference to constitutional or statutory officers appointed by the Governor or elected by the people. In re Advisory Opinion to the Governor (1929), 97 Fla. 705, 122 So. 7.

4. "**County**" officers generally are those whose duties are coextensive with the county, as State officers act throughout the State. In the Matter of Executive Communication of June 2, 1870, 13 Fla. 687.
5. "**District**" officers; qualifications of members of Overseas Road and Toll Bridge District rest entirely within discretion of Legislature. Governor is controlled by statute requiring members thereof to be voters of Monroe County. Advisory Opinion to Governor, 156 Fla. 168, 23 So. 2d 158.
6. "**Municipal**" officers are neither state nor county officers and are not liable to suspension by Governor but only to removal in manner provided by statute. In re Opinion of the Justices, 121 Fla. 157, 163 So. 410.
7. Statutory requirement that statutory officer be appointed "by and with consent of Senate" is constitutional and does not unduly restrict Governor's discretion and judgment in exercising appointive power. Advisory Opinion to Governor, 147 Fla. 148, 2 So. 2d 372.
8. A **woman** is eligible for appointment by the Governor to the office of county treasurer, she being an adult, unmarried, and a citizen and resident of the State, there being no constitutional or statutory provision governing the subject. There is no necessary connection between qualifications of electors and officers. Electors must be male; married women cannot give bond. Qualifications of

most lesser offices are left in discretion of people, "limited only by a common understanding, equivalent to law, that prohibits electing to office any person who is not in some wise a member of the body politic." In re Opinion of Judges, 62 Fla. 1, 57 So. 351, Ann. Cas. 1913C 1161.

9. (a) Appointment of acting officer, to act in place of regular appointive officer given leave of absence for military service, does not require confirmation by Senate. Advisory Opinion to Governor, 152 Fla. 674, 12 So. 2d 879.

(b) Governor had authority, under duty to see laws faithfully executed, to assign the county solicitor of another county to act for a disqualified county solicitor of another county, there being no attorney of the county willing to take the representation. Advisory Opinion to the Governor, 152 Fla. 119, 10 So. 2d 926.

10. In order to qualify, an officer must take prescribed oath and, if required to, give bond. In re Advisory Opinion to Governor, 65 Fla. 434, 62 So. 363, 50 L.R.A. (N.S.) 365.

B. Vacancies in office.

1. Governor's constitutional powers and duties of appointment are dependent upon their being an office which is vacant. In re Opinion of the Justices, 120 Fla. 729, 163 So. 76 (official court reporters).

2. An office may be vacant even though the preceding incumbent is holding over until his successor qualifies. The Governor's power of appointment is not limited by the provision that an officer shall hold over after his term expires until his successor qualifies. In re Advisory Opinion to the Governor, 65 Fla. 434, 62 So. 363, 50 L.R.A. (N.S.) 365.

3. A vacancy exists in an office upon the happening of one of the following events:

(a) Upon creation of the office by act of the Legislature.

— In re Members of Legislature (1905), 49 Fla. 269, 39 So. 63 (members, board of control).

— In re Opinion of the Justices (1914), 68 Fla. 560, 66 So. 1003 (county judge for newly created county).

— In re Advisory Opinion to Governor (1919), 76 Fla. 649, 80 So. 519 (circuit judge and state attorney for newly formed judicial circuit).

— In re Advisory Opinion to Governor (1919), 78 Fla. 5, 82 So. 612 (circuit judge for newly-formed judicial circuit).

— In re Advisory Opinion to Governor (1923), 85 Fla. 505, 97 So. 127 (circuit judge for circuit attaining population of 75,000).

—In re Advisory Opinion to Governor (1927), 93 Fla. 1024, 113 So. 115 (additional circuit judge).

— Advisory Opinion to Governor (1927), 94 Fla. 620, 113 So. 913 (motor vehicle commissioner, special assistant Attorneys-General).

— In re Advisory Opinion to Governor (1927), 94 Fla. 986, 114 So. 889 (clerk, criminal court of record for Palm Beach County).

— In re Advisory Opinion to Governor (1935), 120 Fla. 142, 162 So. 346 (circuit judges).

— Advisory Opinion to Governor (1945), 156 Fla. 55, 22 So. 2d 458 (additional circuit judge).

— Advisory Opinion to Governor (1947), 159 Fla. 464, 31 So. 2d 854 (members, county school board).

— Advisory Opinion to Governor (1949), 42 So. 2d 170 (judge and clerk, criminal court of record for Broward county).

(b) Upon failure of duly elected or appointed officer to qualify within the time prescribed by statute or, in the case of a county officer, by Art. 8, Sec. 7, Fla. Constitution:

— In the matter of Executive Communication of February 1, 1872, 14 Fla. 277 (Attorney-General).

— In re Advisory Opinion to Governor (1913), 65 Fla. 434, 62 So. 363, 50 L.R.A. (N.S.) 365 (state officer).

(c) By resignation.

— In re Advisory Opinion to Governor (1912), 64 Fla. 16, 59 So. 782 (circuit judge, state attorney, judge criminal court).

— In re Advisory Opinion to Governor (1935), 120 Fla. 142, 162 So. 346 (circuit judge).

— Advisory Opinion to Governor (1944), 154 Fla. 822, 19 So. 2d 198 (members, county board of public instruction).

— In re Advisory Opinion to Governor (1950), 46 So. 2d 21 (members county board of public instruction).

But the office is not vacant until the effective date of the resignation, and the resignation may be withdrawn by the officer before its effective date, when no commission has issued to a successor. In re Advisory Opinion to Governor, (1934), 117 Fla. 773, 158 So. 441.

(d) By the incumbent's acceptance of another office. In re Advisory Opinion to Governor (1918), 76 Fla. 418, 79 So. 874 (Senator).

(e) By the expiration of the term.

— Advisory Opinion to Governor (1931), 101 Fla. 1510, 136 So. 623 (additional circuit judge).

— Advisory Opinion to Governor (1941), 147 Fla. 157, 2 So. 2d 378 (additional circuit judge).

Not affected by preceding incumbent holding over — see 2. above.

(f) By constitutional amendment affecting term of office. In the Matter of Executive Communication of October 5, 1875, 15 Fla. 735 (justices of the peace).

(g) By incumbent's appointment being held invalid.

— Advisory Opinion to Governor (1941), 147 Fla. 148, 2 So. 2d 372 (assistant state attorney).

— In re Advisory Opinion to Governor (1953), 63 So. 2d 321 (hotel and restaurant commissioner).

(h) Upon death of incumbent.

— In re Advisory Opinion to Governor (1926), 92 Fla. 989, 111 So. 252 (county tax collector).

— In re Advisory Opinion to Governor (1952), 60 So. 2d 285 (Supreme Court Justice).

Not so for disability: An office is vacant when there is no incumbent authorized to perform functions of office. Mental or physical disability does not disqualify incumbent. Therefore, long continued illness of Circuit Judge did not authorize Governor to appoint a person to fill a vacancy. In re Opinion of Justices (1914), 67 Fla. 423, 65 So. 4.

Nor for disqualification: Governor had authority, under duty to see laws faithfully executed, to assign the county solicitor of another county to act for a disqualified county solicitor, there being no attorney of the county willing to take the representation. Advisory Opinion to Governor (1942), 152 Fla. 119, 10 So. 2d 926.

Appointment on death of U. S. Senator, see ELECTIONS 2.

(i) By suspension. See OFFICERS E, below

4. An officer may be granted a leave of absence for military service without vacating his office. In re Advisory Opinions to the Governor (1942), 150 Fla. 556, 8 So. 2d 26, 140 A.L.R. 1481; supplemented 151 Fla. 44, 9 So. 2d 172, 140 A.L.R. 1492 (each advisory consisted of three opinions).

Appointment of acting officer, to act in place of regular appointive officer given leave of absence for military service, is not required to be submitted to Senate for confirmation. Advisory Opinion to Governor (1943), 152 Fla. 674, 12 So. 2d 879.

C. Appointment by Governor; term.

1. Elective office, vacancy in.

(a) When a vacancy exists in an elective office, Governor has authority to fill office by appointment, formerly to next general election, or, since 1944, to January following next general election: —

— In re Advisory Opinion to Governor (1927), 94 Fla. 986, 114 So. 889 (clerk of criminal court of record).

— Advisory Opinion (1889), 25 Fla. 426, 5 So. 613 (county officers; act to limit power of Governor held unconstitutional).

— In re Advisory Opinion to Governor (1913), 65 Fla. 434, 62 So. 363, 50 L.R.A. (N.S.) 365 (state officer).

— Advisory Opinion to Governor (1943), 152 Fla. 686, 12 So. 2d 876 (circuit judge).

— Advisory Opinion to Governor (1944), 154 Fla. 822, 19 So. 2d 198 (members of county boards of public instruction).

— Advisory Opinion to Governor (1947), 159 Fla. 464, 31 So. 2d 854 (members of county boards of public instruction).

— Advisory Opinion to Governor (1949), 42 So. 2d 170 (judge and clerk, Criminal Court of Record for Broward County).

However, when statute creating statutory elective office provided for all vacancies to be filled by Governor, Governor should appoint for entire unexpired term, despite intervening general election. In re Advisory Opinion to Governor (1950), 46 So. 2d 21.

(b) Officers appointed to general election of 1916 would, in absence of other intervening appointment, hold over until beginning of elected officers' terms in January, 1917. In re Advisory Opinion at the Request of Governor (1916), 72 Fla. 422, 73 So. 742 (county officers).

(c) Term of county judge elected for new county created in 1914 should expire at end of all 4-year terms in January, 1917; Art. 18, Sec. 10. In re Opinion of the Justices (1914), 68 Fla. 560, 66 So. 1003.

(d) Term of elective office held to be four years after election and qualification of first incumbent. In re Advisory Opinion to Governor (1927), 94 Fla. 986, 114 So. 889 (clerk of criminal court of record).

2. Appointive office.

(a) When a vacancy exists in an appointive office, Gov-

ernor has authority to fill office by appointment to end of next Senate session. Office is then filled for balance of term by officer appointed by Governor and confirmed by Senate: —

— In the Matter of Executive Communication of February 1, 1872, 14 Fla. 277 (Attorney-General; Governor cannot make commission expire earlier than end of term provided by law.)

In re Advisory Opinion to Governor (1903), 45 Fla. 154, 34 So. 571 (circuit judge, judge of criminal court of record).

—In re Advisory Opinion to Governor (1912), 64, Fla. 16, 59 So. 782 (circuit judge, state attorney, judge criminal court).

— In re Advisory Opinion to Governor (1927), 93 Fla. 1024, 113 So. 115 (additional circuit judge).

— Advisory Opinion to Governor (1941), 147 Fla. 148, 2 So. 2d 372 (assistant state attorney).

— Advisory Opinion to Governor (1941), 147 Fla. 157, 2 So. 2d 378 (additional circuit judge).

— Advisory Opinion to Governor (1943), 152 Fla. 686, 12 So. 2d 876 (circuit judges, appointive until 1948).

(b) The Constitution clearly contemplates joint action by the Governor and the Senate in the matter of appointments to office when possible and as soon as possible and hence Governor should submit appointments to special session, rather than await next regular session. Confirmation of appointments is not "legislative business" within meaning of limitation on subjects in call for special session. In re Advisory Opinion to Governor, 64 Fla. 16, 59 So. 782.

(c) Statutory requirement that statutory officer be appointed "by and with consent of Senate" is constitutional and does not unduly restrict Governor's discretion and judgment in exercising his appointive power. Advisory Opinion to Governor, 147 Fla. 148, 2 So. 2d 372.

(d) No mandatory duty rests on Governor to make appointment and submit same to Senate for confirmation until preceding term of office ends and vacancy exists, but such procedure is permissible. Advisory Opinion to Governor, 101 Fla. 1510, 136 So. 623; In re Advisory Opinion to Governor, 120 Fla. 142, 162 So. 346; Advisory Opinion to Governor, 147 Fla. 157, 2 So. 2d 378.

(e) Terms of officers which ran in 4-year cycles from date of first appointment are controlled thereby and not by date of expiration of commission. In re Advisory Opinion to Governor, 137 Fla. 298, 188 So. 218 (judge criminal court, county solicitor).

Term of Circuit Judges when appointive. See JUDGES, 3.

3. Person Succeeding Suspended officer.

(a) Suspension from office does not destroy, but merely suspends, right to office. Officer may be reinstated by Governor or may resume office if Senate does not concur in suspension. Commission of person succeeding suspended officer is merely to exercise all the authority of the office, the duration depending on whether the suspended officer is reinstated, or is removed, or resumes the office. In re Advisory Opinion to Governor, 75 Fla. 674, 78 So. 673.

D. Termination of office.

Upon adoption, constitutional amendment providing term of Justices of Peace to be four years, in lieu of previous provision giving them tenure during good behavior, terminated office of J. P.'s who had served as such for 4 years or longer and set term of four years from appointment for all other J. P.'s then serving. In the Matter of Executive Communication of October 5, 1875, 15 Fla. 735.

E. Suspension and Removal.

1. Suspension and removal of officers under Article 4, Sec. 15 discussed. Governor may only suspend, cannot remove; can suspend only when Senate not in session. Recommendation of Governor and concurrence of Senate are both necessary to removal. Removal or re-instatement is effective immediately upon action of Senate. If Senate fails to act on suspension, upon its adjournment officer is automatically re-instated. Effective date of suspension may not be postponed because, if cause exists, public is entitled to immediate relief. Upon suspension, Governor may appoint someone to perform duties of office until officer is re-instated or next Senate adjourns. Upon permanent removal, office is vacant as though incumbent had died and Governor had power to fill office. In re Advisory Opinion to Governor, 69 Fla. 508, 68 So. 450.

2. Suspension from office does not destroy, but merely suspends, right to office. Officer may be reinstated by Governor or may resume office if Senate does not concur in suspension. Commission of person succeeding suspended officer is merely to exercise all the authority of the office, the duration depending on whether the suspended officer is reinstated, or is removed, or resumes the office. In re Advisory Opinion to Governor, 75 Fla. 674, 78 So. 673.

3. A circuit judge is not subject to suspension or removal from office by the Governor. Opinion of the Justices, 67 Fla. 489, 65 So. 224; In re Advisory Opinions to the Governor, 150 Fla. 556, 8 So. 2d 26, 140 A.L.R. 1481; 151 Fla. 44, 9 So. 2d 172, 140, A.L.R. 1492. The last cited opinion further stated that circuit judges may be transferred between circuits by

the Governor to fill vacancies and that lesser judges may be suspended by the Governor if necessary to public welfare.

4. Governor has power to suspend from office only such officers as are elected by the people or appointed by the Governor, who are not subject to impeachment. Since the state health officer is not so elected or appointed, Governor has no authority to suspend him. In re Advisory Opinion to Governor, 78 Fla. 9, 82 So. 608.

5. Suspension of members of county boards of public instruction is an executive function and may be done only by Governor. The State Board of Education may suspend lesser officials, not elected by the people. In re Advisory Opinion to Governor, 97 Fla. 705, 122 So. 7 (One Justice dissents, no opinion.)

6. Administrative officers of executive department liable to impeachment are the cabinet officers only and hence Governor could recommend to Senate permanent removal of a member of Game and Fresh Water Fish Commission.

Suspension or removal of officers is the general rule, and impeachment is the exception. In re Advisory Opinion to the Governor, Fla., 52 So. 2d 646.

7. An inspector whose term of 4 years is provided by statute is an officer whose suspension for cause by the Governor must be reported to the Senate at its next session.

A supervisor who holds his appointment at the will of the Governor, may be terminated at the will of the Governor, a fixed term, requiring a suspension from office, not being contemplated by the statute creating the office. In re Advisory Opinion to the Governor, 76 Fla. 500, 80 So. 17.

8. Municipal officers are not liable to suspension by Governor. In re Opinion of the Justices, 121 Fla. 157, 163 So. 410.

9. Suspended officer may, upon being elected and qualifying therefor, receive his commission for succeeding term, even though Senate has not acted upon his suspension. In re Advisory Opinion to the Governor, 31 Fla. 1, 12 So. 114, 18 L.R.A. 594.

10. Causes for suspension from office contemplated by Constitution are those arising from conduct during term for which officer is then in commission. Hence, Governor is not authorized to suspend an officer for an act committed during a previous term. In re Advisory Opinion to Governor, 64 Fla. 168, 60 So. 337.

11. A pardon does not restore an office forfeited in consequence of conviction and judgment. In the Matter of Executive Communication of September 23, 1872, 14 Fla. 318.

PENSIONS

1. A pension is a periodic allowance from government for

past services and, when lawfully allowed by Legislature, may be considered a legitimate state expense. Governor is authorized to countersign a warrant for a pension authorized by statute. In re Advisory Opinion to Governor, 98 Fla. 843, 124 So. 728.

SALARIES OF OFFICERS

As to appropriations for salaries, see APPROPRIATIONS 4, 5, 7 and 8.

1. Under Constitutional provision that "the salary of each officer shall be payable quarterly upon his own requisition", it would be irregular if not unlawful for Comptroller to issue and Governor to countersign warrant for salary of Commissioner of Agriculture for part of quarter prior to end of quarter. "No salary or part of a salary of an officer should be paid before it becomes lawfully due and payable." In re Advisory Opinion to the Governor, 74 Fla. 250, 77 So. 102.

2. Members of Legislature are not officers, whose pay is included in constitutional provision that "salary of officers" shall be payable quarterly. In the Matter of Executive Communication of January 29, 1869, 12 Fla. 689.

STATE ROADS

The State Road Department is a component part of State Government, exercising portion of sovereignty of state; its product is state property.

The construction and maintenance of state roads are among the current expenses of the state which the Constitution commands the Legislature to raise sufficient revenue to defray. The Constitution does not contemplate issuing bonds for current expenses. State bonds can be issued only for certain purposes; the spirit and intent of the inhibition should be given full effect.

Governor is not authorized to sign warrant in payment of principal or interest on temporary loan by state road department. In re Advisory Opinion to Governor, 94 Fla. 967, 114 So. 850.

See also ADVISORY OPINIONS, D (a) (9); CLAIMS 1; OFFICERS A 2.

STATUTES

As to consideration of statutes in an advisory opinion, see ADVISORY OPINIONS.

As to enactment of statutes, see LEGISLATIVE.

As to salary and pension, see APPROPRIATIONS, PENSIONS.

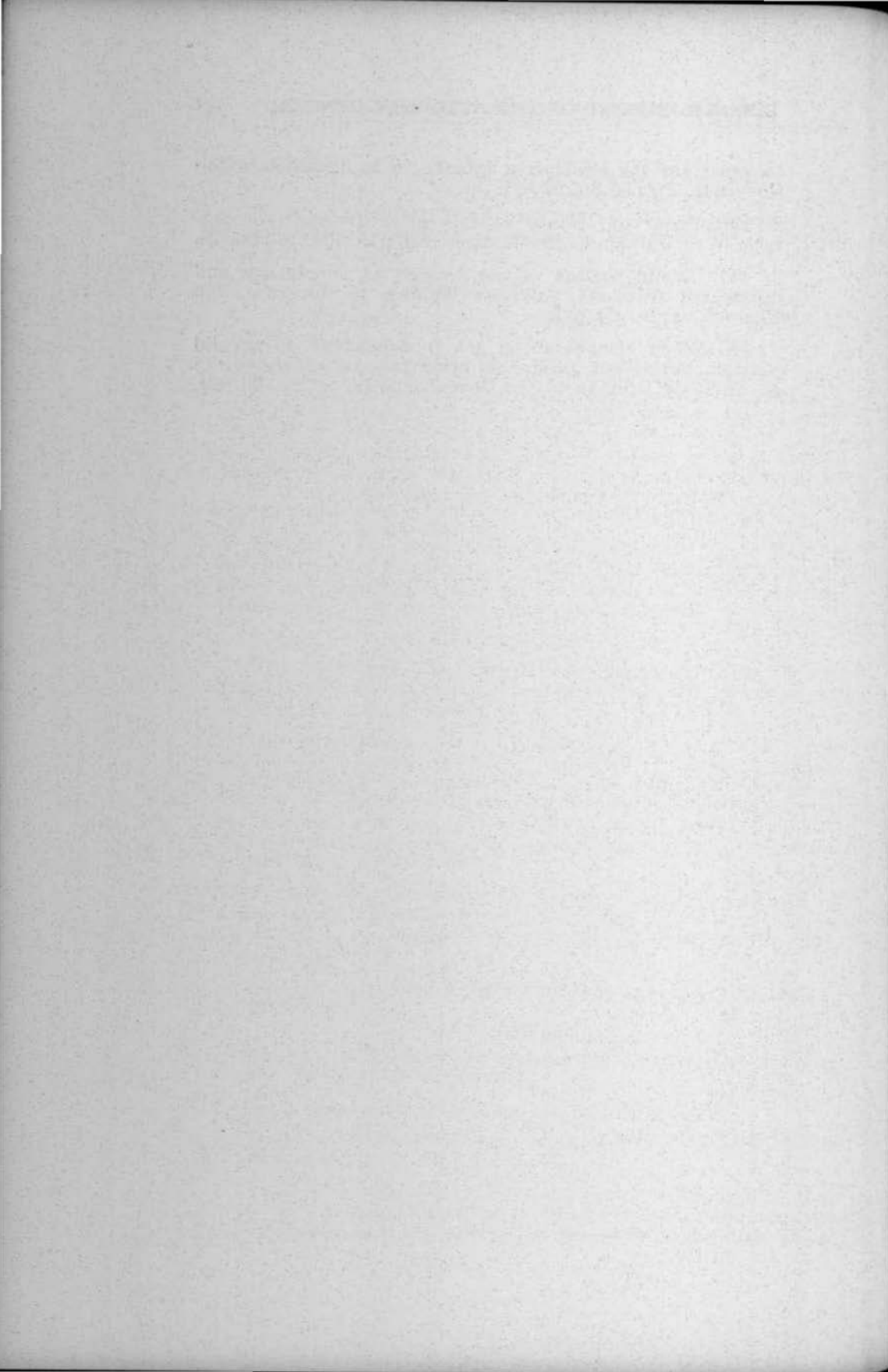
1. It is a cardinal rule of statutory construction that a statute comprehending a whole subject-matter must be construed as a whole, and not by sections, standing alone,

to ascertain the legislative intent, In re Opinion to the Governor, Fla. 60 So. 2d 321.

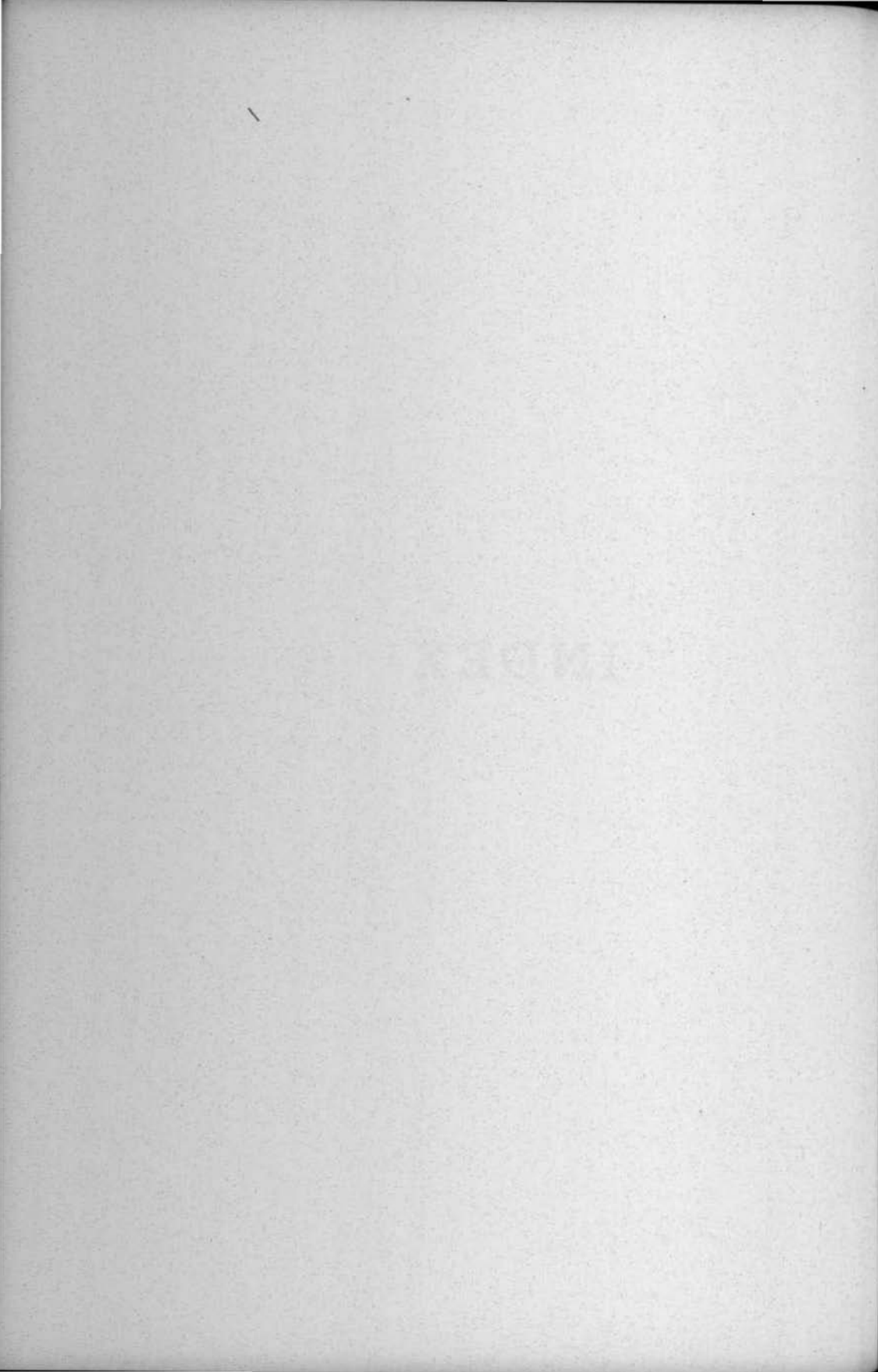
2. Enactment of statute repeals prior inconsistent statute. In re Opinion of the Justices, 120 Fla. 734, 163 So. 78.

3. (a) Invalid portion of act treated as surplusage and eliminated from act. Advisory Opinion to Governor, 146 Fla. 622, 1 So. 2d 636.

(b) When remainder of act is dependent on invalid portion, entire act falls and prior law is reinstated. In re Advisory Opinion to the Governor, Fla., 63 So. 2d 321.



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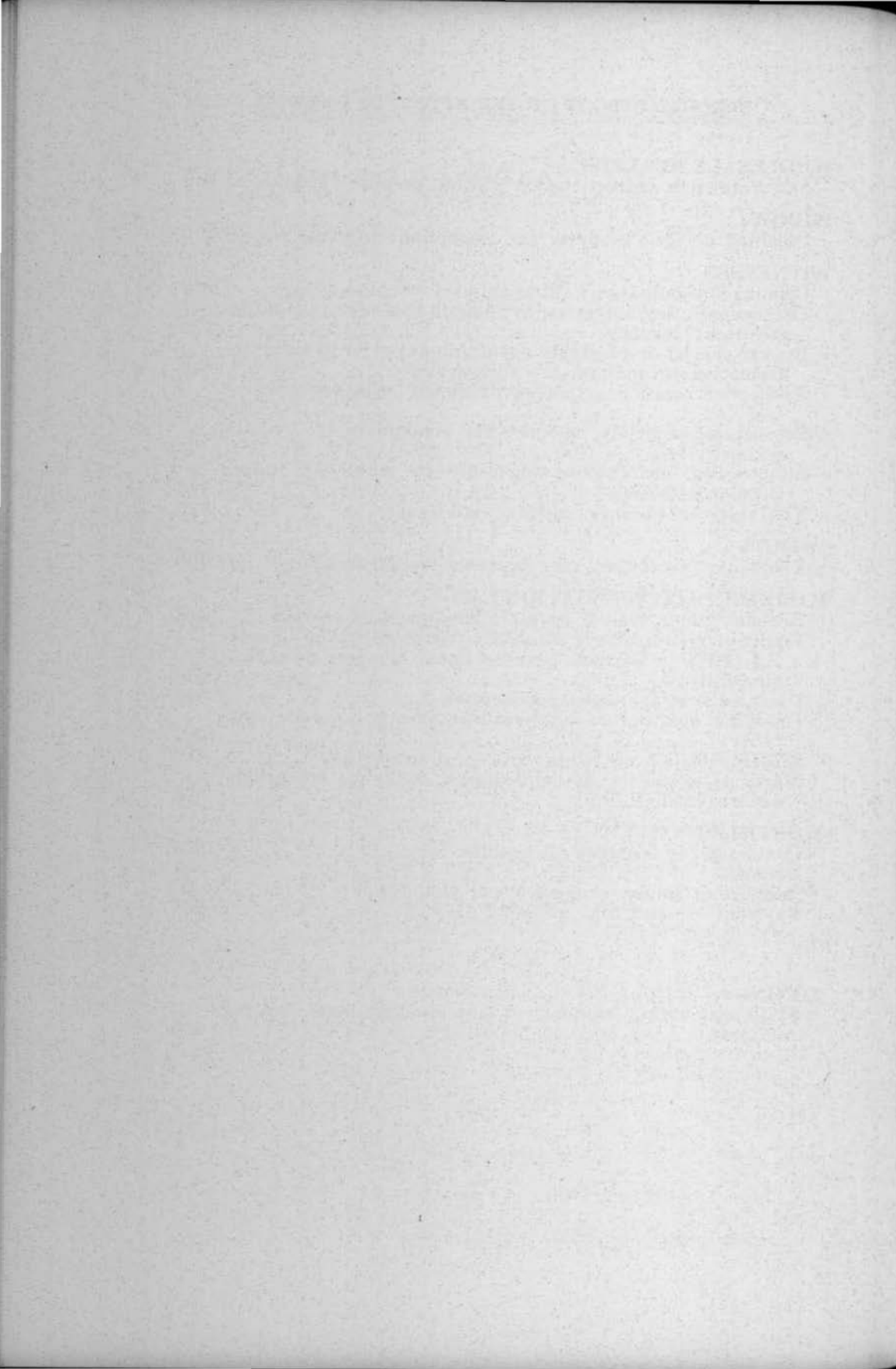
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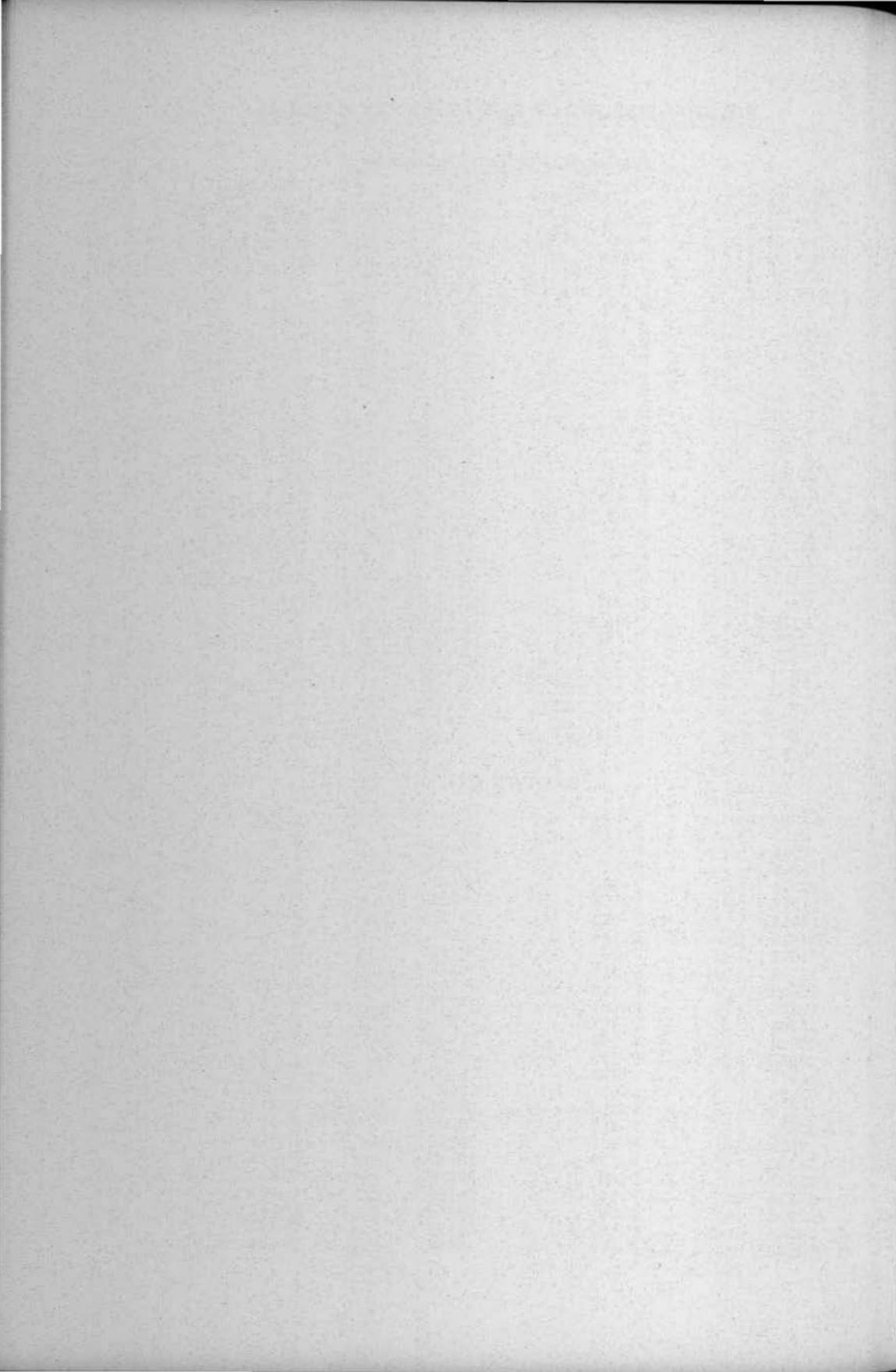
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